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BACKGROUND PAPER

PERSONAL AUTONOMY AND THE CRIMINAL LAW: EMERGING ISSUES FOR WOMEN

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INTRODUCTION

Women come to the criminal law with seemingly conflicting demands. In some arenas, the state is asked to intervene to protect women's interests in safety. Yet it is asked to withdraw from other arenas in order to safeguard women's interests in bodily integrity. The theme that unites these demands is a vision of a society where women enjoy relative equality in terms of their ability to pursue autonomous lifestyles, free from the fear of pervasive violence and the threat of state control over sexuality and reproductive destiny. This background paper assesses those demands which have been met by the Canadian government to date. It also identifies emerging criminal law issues that have the potential to empower or oppress women.

The first section of the paper sets out four possible equality models that could be used to facilitate women's autonomy. The selection of a preferred equality model or models will in turn affect the assessment by the Canadian Advisory Council on the Status of Women (the Council) of alternative legislative reforms regarding the emerging criminal law issues facing women.

The second section of the paper surveys these new criminal law issues. Four major areas or issues were selected by the Council for development in this background paper:

- Wife Battering
- Sexual assault
  - definition of
  - use of rape trauma syndrome evidence to prosecute
  - videotaping of child victims' testimony;

- Feticide (causing the death of a foetus)
- Special defences for women
  - battered women syndrome
  - premenstrual syndrome
  - post-partum depression

The relevant Canadian and U.S. law is surveyed for each of the identified issues. Each section concludes with alternative legislative proposals, which are explained and evaluated for their relative advantages and disadvantages.

The Council identified these issues as worthy of exploration on the following grounds: the population affected by the issues, the relative lack of Canadian feminist legal scholarship on the issues, the imminence of resolution of the issues either in the courts or in the House of Commons, the existence of sufficient social science data to permit development of a tentative position on the issues, and the political feasibility of moving toward law reform.

Several of the issues chosen are not new, but instead involve new approaches or solutions to issues on which the Council has previously taken a position that it might now wish to reconsider. For example, wife assault and the definition of sexual assault are old issues that are re-examined here in light of new legislative solutions. Other issues, such as the use of rape trauma syndrome evidence to prove the offence of sexual assault, special defences for women, and the concept of an offence of feticide, constitute relatively novel issues in the Canadian legal context that have not yet been addressed by Council proposals.

The scope of this background paper was limited not only by time constraints, but by other factors and therefore does not deal with all the important criminal law issues confronting women. For instance, abortion, pornography, prostitution, and other sexual assault issues (such as the exclusion of evidence of the victim's past sexual conduct) were omitted on the basis that the Council has already done extensive work on these issues and continues to support its prior recommendations on these questions. Other issues, such as the legalization of abortifacients and the reallocation of the burden of proving consent for the offence of sexual assault, have been left

for future Council projects as more background information on these issues becomes available.

The limited time and space available affected the nature of the research and analysis devoted to the four issues selected for this paper. All the law reform proposals that emerge deserve further empirical research and intensive feminist debate. It is hoped that this background paper will serve to inspire both.

EQUALITY THEORIES

Many possible equality theories could be used to guide development of policies on women's justice issues. Four such models are described briefly here and their relative advantages and disadvantages noted. This section of the paper concludes by observing that objectives need to be clarified by the Council before a specific approach can be adopted.

Strict Identical Treatment

This equality model is usually identified as a liberal or egalitarian approach. It denies that there are any important, immutable differences between women and men, and is premised on the idea that if real equality of opportunity exists, women will eventually be on an equal footing socially, politically, and economically with men in our society.[1] This theory calls for the elimination of legal or other distinctions between the sexes and promotes gender-neutral, strictly identical treatment of women and men.

The advantages of this model are that it has a simple and clear application to many issues (i.e., statutory rape laws limited to the protection of young women would violate this model);[2] it is politically feasible in that it is entirely consistent with a liberal political framework; and it carries an

important message that women should not be distinguished as "Other" by our society.[3]

These advantages do not compensate for the disadvantages of this model. One serious disadvantage is that the model assumes the continued existence of the current social and political structure and necessarily measures "equal treatment" by prevailing norms and values. These norms have been shaped by a society that has historically oppressed women, and the norms are therefore male-defined. Thus women can advance and attain equal treatment and rewards only to the extent that they can mimic male career patterns and values. Women risk losing further ground under this model because when they fail to achieve equal "success" under the rule of identical treatment, it may be concluded that women really are inferior!

A second disadvantage of the identical treatment approach is that the judiciary in both Canada and the United States, while willing to apply this model for the benefit of male litigants, has thus far demonstrated intransigence when asked to guarantee strictly identical treatment for women.[4] A third and related problem is that the model has nothing to offer women when there is no analogous male experience by which to claim women's right to identical treatment. Consequently, this model can be used to deny women any rights or protections with respect to pregnancy and abortion.[5]

A fourth and final failure of the identical treatment model is that its emphasis on gender neutrality and formal equality further entrenches inequality by obscuring real social and economic inequalities.[6] While it is true that some amount of statutory sex stereotyping can be eliminated by framing all criminal offences in gender-neutral terms, what is lost is an appreciation of who does what to whom and of the significance of gender in our conceptualization and policing of criminal offences. The result is that unequal gender relations thrive when the rhetoric of gender neutrality denies their existence. For these reasons, the identical treatment model should be rejected as incapable of promoting any significant advancement of women's autonomy interests.

Identical Treatment With Biological Exceptions

This model uses many of the same premises and applications as the strict identical treatment approach. Proponents of this approach argue, however, that to ignore women's actual and immutable biological differences — pregnancy and lactation — and to require that the different social and economic needs generated by these functions be addressed only to the extent that men are comparably situated means that women will inevitably be severely disadvantaged in practice.[7] Other "differences" between women and men are viewed as social or economic constructs that will atrophy as we approach a society that faithfully uses an identical treatment approach. Pregnancy and lactation as differences are not about to disappear, and substantive equality would be blocked by a refusal to take these differences into account in policy and law making. This model would therefore require that women's specific needs in relation to these biological differences be met so that they can participate in all activities in our society.

One advantage of this model is that it is aimed more carefully at producing short-term equal results for women. It is also respectful of women's childbearing function and avoids minimizing its social and economic significance. The other advantage is that the model clearly limits the bases on which women and men can be treated differently.

One disadvantage of this model is that judges might not be able to distinguish invidious from beneficial treatment accorded to pregnant or lactating women. As a result, judges might end up approving of policies that in fact stereotype or disadvantage women on the basis of these biological differences.[8] Further, the model is rather weak in that it does little to alter women's disadvantaged position: the theory supports the current political structure, and it legitimates the inequality of power between men and women as a group by denying that the other disadvantages experienced by women (e.g., vulnerability to rape) are real or deserving of recognition.[9] The major failure of this model is that it assumes that such a principle could radically alter women's disadvantaged position. Thus it hides the pervasiveness of sexism.[10]

Treatment According To All Differences

This theory asserts that since women are different from men, physically, socially, psychologically, economically, and politically, all policies and laws must be designed to take these differences into account, which would eventually result in substantive equality for women.[11] This model does not assume that these differences will or will not disappear over time. Instead, it acknowledges that some of the differences are positive and that others, while perhaps negative, have been created and maintained by the political structure and thus are not about to disappear quickly or without further struggle.

The model has the advantage of exposing and accounting for all the ways women are disadvantaged; it also affirms women's values and realities by respecting those differences regardless of their source. The model also has the important advantage of illustrating the need for structural change and for re-evaluating the rules for determining the meaning and legitimacy of identical treatment as a social policy.

The model also carries certain disadvantages. One is that the model might further entrench differences between men and women that serve to disempower women.[12] Thus, one author has argued that the "female characteristics" that will be rewarded are those that have been developed in women for the purpose of survival under conditions of inequality.[13] This model, like the models discussed previously, might also be used to justify policies that actually oppress women further, e.g., one of excluding women from jobs as prison guards because of their special vulnerability to rape.[14] A final problem with this model is that it focusses on "differences", which is essentially a legalistic construct, instead of on the question of women's systemic subordination.[15]

Subordination Principle

This model defines women's inequality in terms of subordination to men rather than differences between the two groups.[16] Practices, policies, and laws are evaluated to assess whether they operate to maintain women in a subordinate position. If these laws and policies are purportedly justifiable on the basis of women's differences, then the differences themselves must also be examined to ascertain whether they are a consequence of social or economic oppression. The assessment of whether a practice or policy subordinates women is made with regard to its historical origins, its social and economic effects, and its real meaning as understood by women.[17] This model then requires affirmative steps toward eliminating the subordinate status, including, for example, a "redistribution of historical burdens and benefits".[18]

The important advantage of the subordination principle is that it avoids legalistic analysis of what differences are not valid bases for disparate treatment, focussing instead on women's experience of the effect of such practices. It thus asks the law to pronounce on the reasons for gender differences: Do they work to the benefit of the male gender? Do they result in reduced autonomy, self-esteem, employment options, etc., for women? This model is also significant in that it demands practical and immediate remedial action as opposed to formal vindication of abstract rights.[19]

The subordination principle is sufficiently wide that it can encompass all previously discussed models as possible solutions to subordinating laws or policies.[20] This model also appears to be superior to the "treatment according to all differences" approach. First, it would not approve of and entrench differences produced by conditions of inequality.[21] Second, it provides a clearer and more articulate standard for judges to employ in assessing whether a given policy ought to be supported or sanctioned and reversed.[22]

One disadvantage of the model is that it presents the same opportunity for perversion by decision-makers who will not or cannot discern the subordinating effect of certain policies. The other problem is that the model has such potential to alter the social, political, and economic structures of our society that it is likely to be opposed vehemently and vigorously in the political arena.

These four equality models can be used in several ways. They can be invoked individually for different issues; one model can be isolated as a guiding principle for all or most issues; or new models can be created by combining or altering these theories. For instance, the National Association of Women and the Law (NAWL) has adopted a mix of models B and C: it advocates a modified identical treatment approach except with respect to pregnancy issues.[23] NAWL has modified the identical treatment approach because it recognizes the disadvantages of this approach. It therefore employs a gender-neutral, identical treatment model that is, however, sensitive to the differences between men and women and that is designed to achieve substantive equality for women. For instance, laws mandating parental leave would be geared to women's specific physical and economic needs but would be framed in gender-neutral terms.[24]

A different equality model was used in a major review of the criminal law prepared for Status of Women Canada. This review identified the subordination principle as the preferred theoretical approach for criminal law issues as a whole.[25]

The Council might wish to select and develop one model for all its work in the criminal law area for the purposes of consistency and credibility. The subordination principle would seem to be the optimal choice in this regard. It has the ability to detect, explain, and alter women's oppression beyond a legalistic analysis, and it is the most capable of generating a creative vision of a society where women can pursue autonomous but connected lives.[26] Alternatively, the Council might select different equality models depending on whether it is pursuing a strategy involving short-term legislative change or long-term policy planning. It must be noted, however,

that choosing a short-term model such as strict identical treatment may well limit the effective implementation of a long-term strategy involving, for instance, the subordination principle. Therefore, the Council will want to use care in selecting a model or models sufficiently flexible to serve the Council's objectives over the long term.

NEW CRIMINAL LAW ISSUES FOR WOMEN

This section of the paper looks at emerging criminal law issues under two headings: issues that have the potential to augment women's physical safety; and issues that can restrict or expand women's personal autonomy.

Wife Battering

Despite progress in many areas, there have been no *legislative* inroads on the pervasive problem of assault against female partners. Several of the provincial attorneys general and the federal solicitor general have issued guidelines requiring the RCMP, police, and Crown attorneys to lay and pursue criminal charges against assaultive partners as a matter of routine rather than as exceptional procedures.[1] These guidelines represent a marked improvement over the considerable discretion previously available to police and Crown attorneys.

The studies thus far from jurisdictions that use informal guidelines in this fashion indicate very mixed results.[2] Follow-up studies in all the provinces that have guidelines are sorely needed, and attention should be paid to the factors that make this approach successful in effecting significant long-term changes in law enforcement practice.

It is clear, however, that guidelines reducing police and prosecutorial discretion may need buttressing if they are to have a major effect on the criminal justice process. First, guidelines are not legally binding on law enforcement agencies, and thus may not have the same effect on police and Crown attorney practices as legislative imperatives do.[3] Second, if not accompanied by a media campaign, informal guidelines may fail to carry a resounding message to the public regarding the criminal nature of wife assault.[4] Third, the guidelines give no signal to judges that they too should begin treating wife assault seriously by channelling these cases to criminal court instead of family court[5] and routinely convicting and sentencing these offenders.

Legislative solutions to the problem of wife assault have been pursued in 48 of the 50 American states and in several states in Australia.[6] These states have resorted to criminal legislation specifically directed at this conduct in recognition of the fact that social norms tolerating the use of force against female partners are so deeply embedded in the attitudes of police, Crown attorneys, court officials, and judges that something more than neutrally worded arrest and assault laws is necessary to compel even-handed treatment of wife-assault cases.[7]

The following legislative proposals can be considered as separate or cumulative reforms. For all these proposals the Council will probably want to use an expansive definition of spouse and the domestic or familial relationship to include all cohabiting or recently separated relationships that involve some form of physical, psychological, or emotional dependence.

- **Familial Relationship As An Aggravating Feature Of An Assault Charge**

The Law Reform Commission (LRC) recently advanced a proposal that assaults committed against a spouse, child, grandchild, parent, or grandparent should be treated as aggravated assaults.[8] The LRC would differentiate between the substantive offences of assault by touching or hurting and assault by harming[9] but would add a section listing aggravating

features (familial relationship, use of a weapon) that would escalate the sentence available for the crime.[10] These aggravating features are identified on the basis that they "clearly make non-fatal violence additionally alarming to the victim",[11] and the resulting conviction would be for aggravated assault. The LRC states that details surrounding the proof of aggravating factors, the necessary notice to the accused, and sentencing features will be worked out in its forthcoming Code of Criminal Procedure.[12]

This proposal to treat the familial relationship between the parties as a factor rendering the underlying offence more serious derives from a LRC working paper published in 1984 called *Assault*.[13] This paper does not provide much in the way of additional policy analysis in support of the proposal. It notes that attitudinal problems of police and Crown attorneys have resulted in non-enforcement of the law in domestic violence situations and recommends police training and victim support services as the real solutions to the problem.[14] According to the LRC it is clear that redefinition of the offence of assault is not necessary, but that the "special risk" to family members should be an aggravating feature of the offence.[15] A later passage in the paper suggests the motivation behind this proposal: "The upholding . . . of the peaceful security of the family unit calls for special protection . . . for spouses and children liable to suffer domestic violence from those entrusted with their care."[16]

There are advantages and disadvantages to this legislative solution. The advantages are that the LRC proposal would indicate unequivocally to the public, police, Crown attorneys, and judges that wife assault is a crime. It would also convey the message that intra-familial assaults are to be regarded as more serious than other assaults because of breach of trust of the relationship. Heavier sentences for wife assault should be forthcoming under this regime, with the possible consequence of specific deterrence of individual abusers and general deterrence of wife assault in the community. Finally, assuming that the Crown attorney has the discretion to plea bargain with the accused and accept a plea to the lesser offence of assault by touching instead of aggravated assault by touching, this proposal might result in more guilty

pleas. It might therefore relieve many battered women from testifying in court and it might result in a higher overall conviction rate for this conduct.

The major disadvantage of the proposal is that it will remain a law enforceable only on the books unless all of the participants in the system also change their attitudes and behaviour. In other words, the effectiveness of this law depends on victims reporting the offence, police officers arresting and charging the abuser, Crown attorneys pursuing the most serious charges possible, and judges convicting and sentencing in accordance with the legislative policy. A related concern is that because the offence itself is still neutrally labelled "aggravated assault" rather than domestic or wife assault, the message may not be communicated clearly to the public that the specific behaviour constitutes a serious crime. In fact, the built-in incentive to plea bargain down to assault by touching, and the unfettered discretion judges enjoy in sentencing, may mean that heavier sentences will not be handed out under this scheme and deterrence objectives will not be promoted.

A final, significant concern should be stated regarding the articulated policy behind this proposal. The LRC's supporting statements are vague and convey the idea that it is the "family" that is being protected or that spouses are "entrusted" with each other's care. Protection of women in the name of the family or on the basis of women's special vulnerability has rarely worked to women's benefit.[17] Therefore, any support for this legislative proposal should be conditional upon clear policy statements being incorporated in the legislation; for example, family violence is to be treated as a more serious form of assault because

- intimate violence is known to have particularly debilitating physical and psychological effects on the immediate victims and long-term effects on secondary victims such as children;
- economic and emotional interdependence that exists between partners and children make retreat or escape by the victim extremely difficult;
- private violence poses severe problems of detection and reluctant law enforcement.

It is hoped that, in this way, the legislation would avoid further stereotyping, as well as making a positive contribution to educating the public about wife assault.

■ **Domestic Violence As A Substantive Offence**

Domestic violence has been criminalized as a separate offence by several American states[18] and by the state of New South Wales.[19] The new legislation does not provide for higher penalties, nor does it change the proof that the prosecution must offer to secure a conviction, apart from the necessity of proving some form of spousal or familial relationship between the accused and the victim.[20] The proponents of this approach argue that the gathering of valuable statistics will be facilitated and that by convicting the accused of the offence of "domestic violence" rather than a generic assault offence, it will be understood by all that wife assault is a crime.[21] Canadian legislators could go further and elect to provide higher penalties for an offence of domestic violence. In this way they could accomplish the objective of labelling these assaults as more serious than other assaults and thus achieve some additional deterrence effect.

This legislative proposal is preferable to the LRC proposal involving aggravating features. Although the proposed offence is gender-neutral and thus misleadingly conveys the impression that men are equally vulnerable to intra-familial violence, it identifies the wrong more clearly as perpetrated against individuals rather than against the institution of the family.

On the other hand, the proposal carries some of the same disadvantages as the previous proposal. For instance, it too may promote plea bargaining down to a lesser offence. The creation of a distinct offence may further ghettoize domestic violence and may permit judges to develop rules that differentiate this crime from the general body of law on assault in a way that makes proof of the offence even more difficult for the Crown attorney. Finally, this offence would also require dedicated law enforcement if it is to

serve its objectives. The proposal would therefore benefit from supplementation by legislation regarding police and prosecutorial discretion.

■ **Police Obligation To Arrest**

Six legislatures in the United States have adopted laws that *require* arrest in certain domestic violence situations.[22] Available statistics in jurisdictions where arrest is not required indicate that police officers answering domestic violence calls rarely arrest the attacker and remove him from the home.[23] Numerous advantages have been identified as flowing from mandatory arrest laws. Recent work in the United States documents significant short- and long-term benefits for the safety of the victim[24] and the police[25] associated with immediate arrest of the assaultive partner. A mandatory police policy to arrest the assaulter conveys unequivocal state disapproval, it may empower battered women if their learned response of paralysis of the will is not reinforced by lack of interest on the part of the police, and it may immunize battered women somewhat from spousal coercion to put a halt to a criminal investigation. One study has also concluded that a mandatory arrest policy can dramatically influence the rate at which such cases are prosecuted. The practice may also affect the likelihood that the offender will enter a guilty plea to the charge and accept responsibility for his violence during counselling.[26]

A mandatory arrest law also has disadvantages for abused women and others. This sort of law has been criticized as taking control over the instigation of the criminal process away from women, thus exposing them to two separate threats: the threat of retaliatory violence by an angry partner and the threat of contempt proceedings if she refuses to testify at trial.[27] Concern has also been expressed that more state intervention in the home is too harsh a measure for some males and that the intervention will inevitably take place in a way that concentrates on identifiable racial groups and working-class and welfare families.[28]

It has also been argued, however, that reducing police discretion will instead promote race- and class-blind law enforcement.[29] Further, although there are real dangers associated with unconditional reliance on the police to champion women's safety interests,[30] women cannot afford to preserve the "privacy" of the domestic sphere because another level of oppression operates within this sphere.[31]

Finally, it should be noted that this legislative reform is advanced in a context where victims of other types of assaults generally do not bear the responsibility of initiating arrests and laying charges. In other words, this law would not take away a beneficial "choice" traditionally available to victims of crime. Women are able to "choose" whether to initiate the criminal justice process only because the police refuse to do so; by virtue of being deprived of reinforcement by the state, these women are rarely able either to stop the violence against them or to secure convictions in court. It is therefore suggested that the concept of mandatory arrest laws be considered seriously either alone or in conjunction with other reforms.

The content of state laws in the United States requiring arrest of assaultive partners varies. Some states require warrantless arrest if the officer has probable cause to believe that the abusive spouse has violated an eviction order or a protection order (the equivalent of a peace bond in Canada).[32] Others require immediate arrest without a warrant if the officer has probable cause to believe that an aggravated assault has occurred.[33]

In Canada, the police officer has the discretion to make a warrantless arrest for all types of assault. However, in the case of common assault, the officer is directed by the *Criminal Code not* to arrest if he or she believes that there is no need to use arrest to identify the person, secure or preserve evidence, prevent the continuation or repetition of the offence, or ensure that the accused will attend at trial if charged.[34] Therefore, generally speaking, the police are advised to try to avoid arrest for common assaults and to use their discretion regarding arrest for more serious assaults. While the officer who decides not to arrest may use alternative means of initiating the criminal process,[35] it has been argued in the case of wife

assault that arrest is necessary to ensure the immediate and long-term safety of the abused partner.

One legislative solution would be to revise the section of the *Criminal Code* dealing with warrantless arrests so as to require arrest at least in cases where the officer has reasonable and probable grounds to believe that a more serious assault offence, i.e., one involving weapons or resulting in bodily harm, has occurred within a spousal or familial relationship. A duty of mandatory arrest could also be imposed with respect to common assaults that occur within a familial relationship, on the basis that domestic violence demonstrates a pattern of escalation[36] and arrest serves an important inhibitory function, preventing future assaults of a more serious nature. As further statutory reinforcement of a mandatory arrest requirement, the *Criminal Code* could specify what facts shall constitute "reasonable and probable grounds" for belief that an aggravated assault has occurred, such as visible signs of injury or impairment, dangerous weapon involved, officer's prior knowledge of offender's violent behaviour, and so on. Finally, given that police officers are likely to express concern about expanded civil and criminal liability for wrongful arrests, the *Criminal Code* should also be amended specifically to exempt police officers who arrest without warrants in good faith in situations involving familial violence.[37]

- **Requiring The Laying And Pursuit Of Criminal Charges**

The traditional discretion of the police and Crown attorneys to decide whether particular cases will be prosecuted has been eliminated or curtailed by state legislation in Australia and the United States.[38] Reluctance on the part of law enforcers to vigorously pursue criminal charges against abusive spouses has been well documented.[39] It has been speculated that lack of interest on the part of prosecutors in these cases has implications for police conduct, victim cooperation, and the message the offender takes from the criminal process.[40] A portion of this prosecutorial reticence can be attributed to the large numbers of abused women who drop out of the process and refuse to testify in court.[41] One response in the United States has been

to require police and prosecutors to proceed with these cases and to provide an array of support services to the abused women.[42] It has been found that cooperation increases and case attrition rates decrease when the victim perceives that the offence is treated as a public rather than a private concern and when her real needs (i.e., safety) are being addressed.[43]

There are some clear problems associated with legislation requiring that prosecutions of familial violence proceed to trial without the safeguard of prosecutorial discretion. It has been argued that the reform is naïve in that it presumes that criminal prosecution can have an impact on a problem that is so clearly structured into relationships in our society.[44] Again, some advocates for battered women worry that women's safety needs are being compromised, in that the batterer may retaliate, and that public attention is diverted from the need for more and better shelters. Perhaps the most significant concern is that this approach essentially reasserts the value of "making the system work" without regard to women's articulated needs. Thus, women will be deprived of further control over their lives and may be forced to choose between imprisonment for contempt and testifying in court.[45]

These disadvantages can be addressed by qualifications on any "no drop" law. The main objective of such laws is to transform prosecutorial attitudes and policies and to increase conviction rates for wife assault; the objective is not to control or penalize the abused partner. If faced with a reluctant witness, prosecutors should therefore either attempt to prove the case without her testimony or, if necessary, withdraw the charges at trial. Reforms to allow victim input to the sentencing process constitute another important way of giving the woman some control over the process and its effect on her life. This legislative reform should therefore be considered, albeit in tandem with other programs such as sheltering systems so as to provide for the short-term safety needs for these women.

In Canada, the discretion to lay charges rests with the police or any other member of the public in accordance with provisions of the *Criminal Code*.[46] The Crown attorney's discretion to pursue or drop charges emanates from provincial legislation and is basically unguided and unchecked.[47] The

provincial directives regarding domestic violence constitute an effort to force police to lay such charges and Crown attorneys to follow them up in court.[48] There are, however, two problems with this approach. First, the effectiveness of these guidelines has not yet been established,[49] and second, the rigidity of these guidelines can mean that the abused spouse has no control over the process and may, in fact, be jailed for contempt of court if she decides not to testify.[50]

A possible legislative solution to the problem of discretion in laying and pursuing charges would be to amend the *Criminal Code* to require that police lay charges for all serious domestic assaults (i.e., those causing bodily harm or employing weapons) and to remove Crown discretion to drop these charges. This approach has been adopted by legislation in New South Wales.[51] The question of abused partners who decline to testify can be dealt with either by the suggestion made earlier (i.e., requiring the Crown to proceed to trial without the witness) or by adopting a legislative exception along the lines of the New South Wales act. Under this legislation, the prosecutor has no discretion to drop charges, and ordinarily a reluctant victim must testify. However, the judge hearing the charges has the power to excuse the witness from testifying "having regard to the availability of other evidence and the seriousness of the offence in question",[52] provided that the decision by the victim was made without fear or coercion. This solution has the advantage of promoting a norm of compelling testimony, but it permits individuals to be excused in a fashion that is open to public scrutiny and amenable to monitoring.[53]

In conclusion, it is suggested that there would be important benefits to supporting legislative changes to both the substantive law of assault and the procedural laws regarding arrest and prosecution of charges. A specific offence of familial violence or spouse assault would be preferable to the LRC proposal for an aggravating features approach. Either reform standing alone might be sufficient if future research were to demonstrate that informal guidelines limiting police and Crown attorney discretion are effectively reversing the historical tolerance of law enforcement agencies for wife assault. If the research reveals continuing refusal to treat this offence

seriously, then accompanying reforms requiring arrest and a "no drop" policy for Crown attorneys may be advisable.

Sexual Assault

The 1983 *Criminal Code* amendments to the old offences of "rape" and "indecent assault" constituted a major achievement by women's lobby groups. It was hoped that the new three-tier offence of sexual assault, along with its corresponding sentencing scheme and evidentiary rules, would make victims' participation in the criminal justice system less painful and would also result in a higher conviction rate for this notoriously unpunished offence.[1] Since the motivation to redefine "rape" as "sexual assault" arose in part from the view that the old offence promoted an ideology of women as sexual property and failed to protect women's physical integrity,[2] it is probably safe to say that the long-term feminist goals behind these amendments were to change the social understanding of women's sexual integrity and ultimately to eliminate the practice of rape.

Research and theoretical work evaluating whether these goals of rape law reform have been achieved have begun to appear in both Canada and the United States.[3] Several important issues have emerged thus far. First, there are problems with the definition of the offence: how is the judiciary interpreting its boundaries, does the offence adequately represent women's understanding of the wrong, and is the definition having any impact on conviction rates and the social understanding of rape? Second, the defence of consent on the part of the victim continues to be a major stumbling block in securing convictions: how and when can evidence that the victim suffers from a psychological phenomenon — rape trauma syndrome — be introduced to court to defeat a consent defence? Third, prosecutions of sexual offences against children also yield low conviction rates and produce stress for the child witness: can the technology of videotaping be used to alleviate both of these problems?

■ Definition Of "Sexual Assault"

Although the *Criminal Code* defines the offence of assault,[4] Parliament, with the support of women's groups, chose to leave the sexual element of the offence of sexual assault completely undefined. At that time, confidence was expressed that the courts would develop an acceptable legal understanding of "sexual assault".[5]

The courts across Canada are, in fact, grappling with a definition, but the decisions are often contradictory, and some have given a disturbingly narrow reading to the offence. For example, one court held that touching a woman's breast did not amount to a sexual assault because breasts, unlike genitalia, are only secondary sex characteristics, much like men's beards.[6] Another court has reached the opposite conclusion and has decided that because breasts are sexualized by our society, such non-consensual touching should be punished as a sexual assault.[7] Two other approaches have been used by the Canadian courts: one court has asked whether the accused intended to receive sexual gratification from the assault,[8] and another court has asked whether the assault would appear "sexual" to the reasonable observer.[9]

Several feminist legal scholars have commented upon the inadequacies of these tests. At worst, these tests focus on the accused's subjective sexual motivation and thus offer potentially no protection for women.[10] Since sexual attacks may be motivated by hatred of women or the desire to dominate, this test could result in convictions being secured only where the Crown attorney can prove sexual gratification as the primary motive behind the attack. At best, the tests rely on objective determinations of what is "sexual", i.e., dictionary definitions of "sexual characteristics", social norms of perceived sexuality, or the understanding of the "reasonable observer". It has been argued that these "objective" tests are seriously deficient because they inevitably invoke a male-defined perspective of female sexuality.[11] Thus, there is little room for women's perceptions of what conduct infringes upon sexual integrity to enter the judicial construction of the elements of the offence.

These contradictory decisions have also had other repercussions for women. This series of cases has necessitated appeals to the Supreme Court of Canada for clarification,[12] and the cases have probably worked to the benefit of assaultive men in that police and Crown attorneys cannot pursue charges effectively when there is a large amount of uncertainty in the law.[13] In fact, one lower court has refused to adjudicate a sexual assault charge on the grounds that the offence is so vague as to offend the *Charter of Rights and Freedoms*.[14]

The structure and definition of the new offence of sexual assault present problems beyond those associated with vagueness. While the new offences may have produced higher reporting rates with respect to some types of assaults, there is not yet any clear evidence that the new offence structure results in increased conviction rates.[15] In fact, the new offence may well have produced lower sentences for these offences.[16] Some authors have argued, both before and after the 1983 reforms, that the overall effect of the gender-neutral offence of sexual assault is to minimize and mask the very specific harm that women suffer from rape.[17] Further, recent studies indicate that jurors are still assessing the guilt of the accused on the basis of the victim's character, conduct, and relationship with the accused.[18] Even if the accused is convicted, sentencing judges also appear to take some of these same factors into account.[19] It might therefore be said that the "woman as sexual property" theme is still in operation in practice in the courts even though it has been expunged from the legislation.[20]

Before concrete recommendations can be made, further study is needed of the operation and effects of the current Code offence of sexual assault. Two such studies by the federal government are now under way,[21] and analyses of the resulting sentencing patterns have also been undertaken.[22] These studies should assist in determining whether the goals of increasing conviction rates and reducing the trauma experienced by the victim associated with testifying have been substantially achieved by the 1983 reforms. If these objectives remain unmet, women's lobby groups might, for instance, consider returning to a gender-specific offence definition and concentrating on other techniques for ensuring that women's safety interests

are not dependent on their desirability as sexual property. In the meantime, several proposed methods of redefining sexual assault to meet the identified problems are produced below for consideration:

- A short definition section could be added to the offence specifying that touching another by or with certain listed parts of the body — i.e., genitals, breasts, and buttocks, whether or not these parts are covered by clothing — constitutes a sexual assault. Listing has the advantage of being clear and non-discretionary in its application by judges. This approach is very narrow in scope, and it objectifies women's bodies by reducing them to parts.[23] It also fails to perform any educational function that might be served by a fluid definition, which would require judges and others to imagine in what women might perceive as a sexual assault.

- Another option would be to address concerns about recognizing the harm in rape by adopting the approach taken by several American states of defining two levels of sexual offences — sexual penetration (contact or intrusion, by any part of the body or object, into mouth, anus, or vagina) and sexual contact (by any part of the body or object of any erogenous zone whether clothed or not) — which can then become aggravated offences if any further elements are present (i.e., use of a weapon, bodily harm, etc.).[24] This approach has the advantage of clarity, and it can adequately distinguish the conduct that is the most serious and debilitating for women. It has the disadvantage of excluding other conduct that women might consider to be sexual attacks (e.g., ripping a woman's shirt off), and it does not have the same potential to alter and expand societal perceptions of female sexual integrity.

- A more open definition section could be added that asks whether the conduct would be related to sex, and would thus be considered "sexual", if it took place in a consensual situation.[25] This assessment could be made from the perspective of the outside observer. The problems that it would pose include the fact that it may end up being assessed from an essentially male perspective, and it might also be tautological in that our notion of what is sexual in the first place is tied closely to coercive, non-

consensual conduct.[26] In other words, we often cannot assess whether certain conduct, e.g., spanking by a male parent of a female child's buttocks, would be "sexual" if it were consensual. This is because the use of explicit or implicit force and the presence of power imbalance is part of our cultural understanding of sexual relations. This approach thus ignores the significance of *whose* perspective the conduct is assessed from as well as the fact that there is no notion of sexuality abstracted from a social context in which women are often not free to abstain from sexual relations.

- The offence could also be expanded upon by defining sexual assaults as assaults perceived by the reasonable woman as sexual. This definition takes the emphasis off the motivations of the accused, who may not in fact be seeking "sexual" gratification, but neither does it allow an individual victim's perception to control the categorization of the conduct as criminal. Benefits to be derived from this definition are that the offence would be redirected at protecting women rather than male interests in female sexual property. It would also permit women to develop and assert their own notions of female sexuality, and it would force judges and jurors to take into account women's perceptions of what amounts to coercive sexuality.[27]

The first option is probably the most politically feasible given that it does not involve either substantially restructuring the offence or reallocating the power to define what constitutes prohibited sexual conduct. The second option would be slightly preferable from the perspective of women in that it gives more recognition to women's perceptions of the harm in rape. The third option is superior to the second option in that it covers a potentially wider range of conduct and permits educative exploration of the meaning of sexuality in a coercive culture. The best option from women's perspective would be the fourth, however, because it excludes the objective test implicit in the third option and requires that conduct be assessed from a distinctively female view. This would not only develop collective notions of female sexual autonomy but would also shift the criminal law so as to place

women's perceived safety interests at the heart of the definition of the prohibited conduct.

■ **Rape Trauma Syndrome Evidence**

Most women who survive a sexual assault experience a collection of physical and psychological reactions described as rape trauma syndrome (RTS). These reactions include such things as intense fear, anxiety, sleep loss, nightmares, phobias associated with the attack (e.g., fear of being indoors, fear of being outdoors, fear of strangers, fear of acquaintances, etc.), nausea, and sexual dysfunction.[28] Evidence that the complainant in a prosecution for sexual assault is suffering from RTS can serve several important functions. The evidence can be used to corroborate the victim's assertion that the conduct was not consensual, it can assist the Crown attorney in explaining a complainant's memory lapses regarding the offence, and it can be used at the sentencing stage to assess the gravity of the offence and the appropriate punishment.[29] Community education about the offence of rape and its consequences can be an important side-effect of introducing RTS evidence.[30] Finally, this sort of public affirmation of the normality of the complainant's response to the attack may assist her in the recovery process.[31]

Information about RTS was first developed by the feminists who staffed rape crisis centres.[32] Their studies were used primarily to understand and facilitate the recovery process for survivors of sexual attacks. RTS has since been the subject of intensive research by mental health professionals, and at present, the unique symptoms associated with RTS are also used to diagnose the nature and source of a woman's emotional stress. While not recognized officially by the American Psychiatric Association, RTS is accepted as valid almost universally by the profession.[33]

A prosecutor wishing to use RTS evidence as part of a rape case can take two routes. S/he can have the complainant examined by a psychiatrist or psychologist experienced with RTS who will then testify as to the diagnosis and the likelihood that the reaction could have been provoked

by something other than a non-consensual sexual attack. The other alternative open to the prosecutor is to have the expert simply explain RTS and its symptoms to the court, then have the complainant and others testify as to her emotions and behaviour after the assault. The prosecutor will then in summation ask the trier of fact to draw the inference that the woman suffers from RTS and that the element of non-consent has been proven. Although this latter route presents perhaps less powerful evidence, the complainant is saved the experience of a psychiatric examination, and the accused is unlikely to be able to have her examined by his expert to refute evidence of RTS.[34]

The use of RTS evidence at the trial stage has met with mixed success in the United States. Several state courts have permitted an expert witness such as a psychiatrist to tender an RTS diagnosis in a rape trial;[35] other state courts have excluded RTS testimony on the grounds that the evidence did not meet the requirements for the admission of expert evidence.[36]

There are not yet any reported Canadian cases dealing with the admissibility of RTS evidence. However, RTS testimony has been allowed at trial level in at least one recent civil case in Ontario.[37] If this evidence is to be used in sexual assault trials, it will likely have to meet the same tests used by the American courts.[38] Crown prosecutors will have to show that RTS is generally accepted by the mental health profession as a reliable diagnostic tool, and proposed witnesses will have to demonstrate their professional qualifications and expertise regarding RTS. A Crown attorney will need to convince a judge that RTS is beyond the ordinary experience of most jurors and that the testimony will assist them in deciding an issue in the case. However, the expert will need to refrain from expressing an opinion on the ultimate issue in the case (i.e., whether the woman was, in fact, raped).[39]

There are risks associated with the use of RTS evidence. One concern is that women have been extremely disadvantaged by the psychiatric profession both within the legal system and outside it. There is a legitimate fear that giving legal recognition to RTS will permit further medicalization of women's experiences and will promote a stereotype of survivors of sexual

assault as mentally unbalanced.[40] It will therefore be important to characterize RTS as neither a biological nor a psychological condition, but rather as a normal reaction to the extreme external stressor of rape.

A second concern is that the admissibility of RTS evidence may be used to the detriment of the victim and the prosecution. One specific fear is that a judge may order the victim to undergo a psychiatric examination by a doctor selected by the accused so that he can rebut RTS evidence or prove consent by showing that the woman is not suffering these symptoms.[41] This is particularly troublesome because not all complainants experience RTS, and the ordeal of a hostile psychiatric interview might be quite devastating.[42] This concern can perhaps be met by employing the suggested prosecutorial tactic of simply asking the prosecution expert to testify in the abstract regarding RTS rather than examining and reporting on the woman's specific condition.[43] In addition, to ensure that the evidence is admissible and that judges do not begin ordering the examination of victims, a section could be added to the *Canada Evidence Act* that would specify the requirements for proposed expert evidence and specifically list RTS evidence as potentially admissible. This section could also state that the accused is entitled to the opportunity to interview the woman if the results of a psychiatric examination are to be introduced by the Crown attorney, but that otherwise the accused is barred from this sort of access.

A third concern regarding the use of RTS evidence in prosecuting sexual assaults is the idea it may unduly focus the jury's attention on the conduct and reactions of the victim rather than on the more pertinent issue of the assault by the accused. RTS evidence may thus be distracting for the trier of fact and it may permit the accused to pursue irrelevant questioning that would otherwise be barred.[44] Finally, testifying as to her own experience of RTS, including such symptoms as sexual fears and abstinence, may be overly traumatic and destructive for the victim herself.

These concerns are not easily addressed. Their resolution depends in part on prosecutorial skill and experience with the handling of this evidence, sensitivity to the need to let individual female witnesses decide

whether RTS evidence should be used, and awareness of the need to prepare her adequately for the courtroom experience. One American prosecutor has conducted interviews with jury members after her trials and has concluded that RTS is not distracting but is instead helpful for the jury in determining the issue of consent.[45] The author believes that the use of RTS evidence in sexual assault cases ought to be encouraged and facilitated by the legislative changes proposed above. This recommendation is subject, however, to the need to collect further data regarding trial outcomes and victim reactions to the use of RTS evidence, and to use any such data in shaping reform proposals.

■ Videotaping Children's Evidence

An important innovation in the criminal trial process has been introduced in many American states in response to the trauma suffered by the child witness testifying about sexual abuse and the ensuing low conviction rates in these trials.[46] The state statutes basically permit a child to recount the evidence on videotape prior to trial in a low-stress environment. The video may be used to supplement the child's testimony at trial, or, in some states, if the accused was permitted to have his lawyer attend the video session and cross-examine the child, the video may be shown at trial and the child excused from giving testimony in court.[47] These statutes all stipulate different requirements as to when videotape evidence may be used, and they constitute legislated exceptions to the hearsay rule.[48]

There are obvious benefits to using a videotape rather than a child's live evidence at trial. A video can be made soon after the offence is reported: the child's recall may be more complete and fresh, the child may be spared numerous recountings of the assault, and once the filming is complete, the child may be able to cease re-living the event and begin the emotional healing process.[49] The video is also recorded in an environment that is less intimidating than a courtroom. The main interviewer is a worker who has developed a trust relationship with the child. Further, even if a lawyer for the defence is permitted to cross-examine the child directly rather than through the interviewer, the child does not have to face the accused himself,

who is often a friend or family member.[50] Instead, the accused must view the session through a one-way mirror. The evidence procured in this process is on oath and is arguably of superior quality because it is communicated more naturally by the child.[51]

A bill now before Parliament would amend the *Criminal Code* to permit videotapes of complainants in sexual offences who were under eighteen years of age at the time of the offence to be shown at trial "if the complainant adopts the contents of the videotape while testifying."[52] The bill would also permit a judge to exclude the accused from the courtroom during the testimony of such a complainant if "necessary to obtain a full and candid account of the acts complained of."[53] The accused in this situation is entitled to watch the testimony and communicate with counsel via closed-circuit television.[54]

This proposal demonstrates recognition of the important role that videotaped testimony can play. Unfortunately, the bill has serious inadequacies in that it fails to excuse children from testifying in court; it also fails to protect the interests of the accused in ensuring that the videotape will constitute reliable evidence. A more significant innovation would be to permit videotaped evidence recorded in advance of trial to substitute for live testimony provided that

- a trial judge is satisfied, on a motion made prior to the videotaping, that the child is "unavailable" for trial in that s/he would suffer debilitating trauma if required to testify at trial;[55]
- the child gives evidence on oath (or its equivalent), the accused is permitted to view the session from behind a one-way mirror, and the accused is represented by counsel who has an opportunity to cross-examine the child;[56]
- the videotape is of such a quality as to permit the trier of fact to observe the child's demeanour;[57]
- the interviewer is available to testify at trial.[58]

This legislative proposal could be rendered more protective of children's emotional health and less costly to administer if it instead adopted a presumption that children under eighteen years of age are "unavailable to

testify" and required that the accused satisfy the trial judge that the child would not suffer debilitating trauma if required to testify in court. Both provisions deserve further research regarding their effect on children and in-depth analysis to ascertain whether and how they could survive a constitutional challenge under the *Charter of Rights and Freedoms*. However, at this preliminary stage it appears that the proposed legislation would likely survive a Charter challenge because there is an important social policy goal to be achieved through excusing sexually abused children from testifying and because the safeguards of testimony on oath and subject to cross-examination would ensure that the video evidence is sufficiently reliable.[59]

Feticide

The *Criminal Code* now punishes persons who use any means, including an instrument or manipulation of any kind, intentionally to procure the miscarriage of a woman.[1] Similarly, women who attempt to procure their own miscarriages by any means can be punished under the same offence.[2] Therefore, although the Code does not frame the offence as a wrong against the foetus, it already prohibits the intentional killing of a foetus by third parties and pregnant women and punishes at least the former group with potentially severe penalties, including life imprisonment.[3]

Several jurisdictions in the United States have enacted criminal legislation that specifically recognizes and protects the foetus outside the context of abortion law.[4] In addition, the Law Reform Commission is considering recommending that Parliament enact a "feticide" offence. Feticide as a substantive offence would at least punish the conduct of third parties resulting in foetal death to which the woman does not consent. It may also be drafted broadly so as to extend liability for such conduct to the pregnant woman.[5]

The implications of this proposal are alarming. An offence of feticide would recognize the foetus as worthy of criminal law protection in its own right. The conferral of such status might lay the groundwork for

extending other legal rights to the foetus with the consequent limitation of women's access to abortion. Further, if the offence is drafted so as to encompass the conduct of pregnant women within the prohibition, it will involve serious restrictions on women's rights to control their own bodies and may promote an adversarial relationship between woman and foetus. Apart from feminist concerns about this proposal, one might also be reluctant to use the state machinery of the criminal law to deal with conduct that has not yet been documented as a pervasive social problem, and for which other methods of control (i.e., civil law) have not yet been exhausted.[6]

While it is important for women's lobby groups to oppose moves toward feticide legislation clearly and unequivocally, women must prepare for the defeat of the legislation in the various forms it may take. An additional strategy will be for women to identify their interests in this area so that alternatives can be proposed. For instance, women probably view the interruption of a wanted pregnancy as morally culpable conduct that at least aggravates an assault on the woman herself. Women might therefore favour some form of sanction that provides criminal law protection from such conduct and that implicitly values women's childbearing role. However, it would be important to frame the policy and any prohibition in such a way as to distinguish clearly and exclude the conduct of the woman herself and to avoid conferring status on the foetus.

Several important related issues must be addressed before examining the different legislative forms a feticide prohibition might take. First, at what stage in development should the foetus be included within the criminal law? One author in the United States has argued that protection ought to extend from at least the moment of conception.[7] No jurisdiction has yet adopted conception as the onset of criminal liability.[8] The states that do protect the foetus usually use twenty-four weeks or viability as the starting point for criminal liability.[9] This is probably because, in the United States, the state legislatures cannot prohibit women from aborting up until the end of the second trimester in any event,[10] and third parties are unlikely to know of the pregnancy at the time of conception.

There may be some practical advantages to adopting a twenty-four week gestation period as the starting point for criminal liability for foetal death. As a general statement, it is probably fair to say that the more advanced the pregnancy, the more mental anguish and physical trauma the woman will experience. Furthermore, if abortion rights are to be secured using the criterion of maternal choice until at least the twenty-fourth week of pregnancy, it might be politically pragmatic to use the same criterion for criminalization in the feticide context as well. However, if the harm prohibited is to be framed as harm to the woman herself rather than to the foetus as an entity, then the gestation criterion should be discarded entirely. This is because, from the point of view of women, interference from a third party resulting in miscarriage may be as shattering in the early months of pregnancy as in the later months. It is therefore recommended that the legislation extend to all foetal life, provided that the offence uses a sufficiently narrow mental element of knowledge or subjective awareness of risk to pregnancy on the part of third parties.

A second, related issue is how the mental element for this offence would be defined. There are two distinct aspects to the mental element here: what was the state of the accused's knowledge regarding the fact of pregnancy, and what was the state of mind toward the foetus — i.e., was the killing intentional, reckless, or negligent? Some states have imposed criminal liability on third persons who ought to have known that a woman was pregnant, and upon such persons when they were merely negligent or careless in their conduct, including the situation where a foetus dies as a result of a car accident.[11]

It is suggested that even if conduct amounting to feticide is a sufficiently compelling social problem to warrant criminal sanction, it is certainly not so common that it should be placed in the same category as criminal negligence or felony murder offences, which use an objective standard of fault (such as negligence or carelessness) for the additional deterrence value. The conduct of a third party should therefore be punished only if the accused actually knew or was aware that the woman might be

pregnant and either intended to kill the foetus or was aware that his conduct posed a life-threatening risk to the foetus.

No American state has imposed criminal liability on a woman who is negligent toward her foetus, and only one state currently penalizes conduct pursued by a woman with subjective awareness of risk to a foetus.[12] In Canada, the conduct of a woman that results in foetal death is already proscribed by the *Criminal Code* if it is intentional.[13] Women should not be punished for acts that are less than intentional with respect to the foetus. In other words, if a woman pursues a course of action that she knows poses serious risks for her foetus, her conduct should not be sanctioned by the criminal law. Women's liability should be drafted narrowly in this fashion because the woman's freedom of action with respect to her own body is being impinged upon[14] and because such a woman's good faith assessment of foetal risk ought to be respected, given that we have to assume that she intended to carry the foetus to term.[15] It would seem unjust to convict a woman for so harming her foetus given that the medical assessment of this risk will always be tenuous.[16] Furthermore, if a woman can be convicted for conduct that harms the foetus, courts will have a clear foundation on which to grant civil injunctions to control the behaviour of such women.[17]

A third and final consideration is whether conduct that results in harm, but not death, to the foetus should also be criminalized. At least one state has extended a penal law to cover such conduct,[18] and several states permit tort or civil liability to be founded upon harm that results in some form of disability in the newborn.[19] If one accepts that third parties should be punished for conduct causing death to a viable foetus, it is somewhat difficult to argue against extending responsibility to include conduct causing disablement. Proof of causation might become markedly more difficult in this situation,[20] however, and one might also argue that the net of criminal liability ought to be kept as narrow as possible. Furthermore, if the offence is to be conceptualized as harm to the woman, permitting prosecution where miscarriage and foetal death do not ensue but the infant is instead born disabled would seem to shift the focus toward recognizing harm to the foetus.

For these reasons it is suggested that the legislation ought to be directed solely at third-party conduct that results in death to the foetus.

We turn now to the possible legislative sanctions.

■ Failure To Provide The Necessaries Of Life

One possible sanction would be to amend the section in the *Criminal Code* that punishes parents who fail to provide the necessaries of life[21] so as to include the conduct of an expectant mother who fails to secure medical treatment necessary to sustain the life of the foetus. The state of California, for instance, has enacted such a penal law.[22]

It is submitted that any attempt to impose a criminal law duty on an expectant woman to provide the necessaries of life to a foetus should be vigorously opposed. It goes far beyond any foetal rights now recognized by Canadian courts;[23] it does not merely prohibit destructive behaviour by pregnant women, but instead demands affirmative, undefined conduct by the woman; it places a great deal of power in the hands of doctors whose judgements as to what procedures are medically necessary will prevail in legal actions;[24] it puts severe restrictions on women's autonomy by using the criminal law to force women to submit to invasive and perhaps dangerous medical procedures;[25] it constructs an adversarial relationship between the woman and foetus;[26] and, finally, it amounts to a form of subordination by imposing on women a degree of state control to which men could never be similarly subject.[27]

■ Feticide Offence

This proposal would make the killing of a foetus a separate criminal offence on the level of homicide. It should be noted here that a distinct offence of this nature is at least clearly preferable to the approach used in the state of Utah of including the foetus within the scope of ordinary

homicide law by defining "person" to include the unborn.[28] Several other states have enacted distinct feticide offences,[29] and while the penalties for such offences tend to be lower than homicide penalties, they are rather high nonetheless. For example, the state of Iowa punishes feticide with a maximum sentence of ten years' imprisonment, accompanied by a maximum fine of $5,000.[30]

It is recommended strongly that even a feticide statute directed solely at third parties should be opposed by women's lobby groups for two reasons. First, the long-term losses that could ensue for women as a result of creating a legislative precedent for protecting the foetus as a separate legal entity argue against support for an offence of feticide. Second, such an offence might abstract the harm to the foetus from the harm suffered by the woman, and could thus fail to recognize clearly women's physical integrity in its own right.[31]

If an offence of feticide were enacted, it is recommended that pregnant women be excluded from its application. Intentional conduct by the woman is already covered by the Code offence of "procuring a miscarriage", and this offence sounds less condemnatory than "feticide". Even if the offence did encompass the conduct of pregnant women, it has already been argued above that only third parties should be criminally responsible for conduct that is reckless with respect to the foetus.

■ Death Of Foetus As Aggravating Feature Of Another Offence

A final legislative option would be for offences such as assault, sexual assault, and homicide to be escalated by listed aggravating features such as the fact that the attack resulted in the death of a foetus carried by the victim. The Crown attorney would first have to prove the elements of the underlying offence. In addition, the Crown would need to prove that the accused had actual knowledge of the woman's pregnancy or subjective awareness of the risk that she was pregnant, and that he or she either intended to cause the foetus to die or was reckless as to the consequences of

the conduct. If convicted of the aggravated offence, the accused would be liable to a higher sentence in recognition of the serious harm caused by the attack. An analogous legislative model is in use in at least one American state; an accused can be convicted of a third degree felony if he causes a miscarriage in the course of committing some other felony such as assault or rape.[32]

This legislative approach has several important features. It does not create a new substantive offence, nor does it confer a particular status on the foetus. It recognizes that the loss of a pregnancy is a serious wrong to the woman herself and imposes the additional penalty on the basis that the accused intended to commit a wrong against her bodily integrity,[33] not because the foetus is worthy of protection in its own right. Practically, this offence would cover the vast majority of "feticides" because it seems almost impossible that a third party could kill a woman's foetus against her will without committing some form of assault upon her. Another alternative would be to include death of a foetus as a specific aggravating feature in sentence determination.

One might oppose even this reform on the assumption that any movement toward legal acknowledgement of the foetus will ultimately legitimate governmental control over women's reproductive capacity. This concern might be alleviated, however, by ensuring that the section describing the aggravating factors clearly frames foetal death as a loss suffered by the woman. It should also be noted that, unlike the feticide offence, this proposal can be used *only* to sanction the conduct of third parties, not the conduct of pregnant women.

In conclusion, two possible strategies emerge from this discussion. The Council could flatly oppose all attempts to criminalize conduct resulting in foetal death for the policy and pragmatic reasons previously described. Alternatively, the Council could identify women's interest in this issue and, by employing an approach such as the final option cited above, use the public support for some sort of feticide law to anchor instead a law that would empower rather than further oppress women.

Special Defences For Women

This section of the paper addresses whether and to what extent the law ought to recognize criminal law defences that are unique to women. The issue involves questions of bodily integrity because the law has the power to confer legitimacy upon women's conduct based upon recognition of unique biological and/or social experiences. Resolution of the special defences question depends on which equality theory one adheres to: a strict identical treatment approach would deny the availability of gender-specific defences; an identical treatment with exceptions approach would permit only special defences linked to childbirth and lactation; a differences approach would readily embrace special defences for women; and the subordination principle would carefully examine any special defence proffered to ascertain whether its recognition would ultimately empower or subordinate women. Thus, the issues discussed below could be resolved in a number of ways depending on the theoretical approach(es) ultimately adopted by the Council.

■ Battered Woman Syndrome

Battered woman syndrome (BWS) is not technically a defence on its own. Rather, it involves expert evidence regarding a social and psychological phenomenon[1] that is introduced at trial to bolster some other defence used by the accused. Evidence describing the effects of BWS or asserting that the particular accused suffered BWS has been used to establish defences of self-defence and provocation;[2] it has also been used to mitigate punishment at the sentencing stage.[3]

In these cases, the testimony of the expert on BWS is used to explain the cyclical and escalating nature of domestic violence and the "learned helplessness" response of the abused partner that, apart from economic and physical safety reasons, prevents her from escaping the situation. It is also used to show that a battered woman may be excruciatingly familiar with and sensitive to signals of imminent violence that would go unnoticed by the outside observer.[4] Because the BWS describes and

interprets the psychological consequences of a particular abusive relationship, evidence of this nature has thus far been used only to defend against homicide charges where the woman has struck out against her abuser. However, this evidence could conceivably be used to defend against charges involving violence less than homicide and aggressive conduct directed against someone other than the primary abuser.

An accused who wishes to use BWS evidence in her defence must meet the test for expert evidence earlier set out under the discussion of rape trauma syndrome evidence.[5] The difficulties lie in convincing a court that BWS is recognized by the psychology profession and that the evidence is relevant to a legally recognized defence. In the United States, such evidence has frequently been used with success to secure both absolute acquittals on the basis of self-defence and convictions for the lesser offence of manslaughter.[6]

Canadian courts have not yet handed down any detailed rulings on the admissibility and use of BWS evidence. One provincial appellate court has severely restricted the utility of this evidence by requiring that the accused act to prevent actual violence rather than anticipated violence when relying on the statutory defence of "defence of others".[7] On the other hand, at the trial court level, one Canadian woman has been acquitted of manslaughter with the aid of BWS evidence, and another has used this evidence to show lack of intent to commit murder, with the result that she was convicted of the included offence of manslaughter.[8] Finally, BWS evidence has been used in at least two Canadian cases to demonstrate that the accused acted out of particular and sympathetic circumstances and is unlikely to pose a danger to anyone else: in both cases the accused received a suspended sentence for manslaughter instead of incarceration.[9]

Reliance on BWS evidence in proving defences has the potential to create serious problems for women. First, BWS has been popularized by the news media, with some support from judicial commentary, as a status defence of its own right. In other words, the impression is frequently conveyed that women can secure acquittals simply by showing that they were battered

women.[10] The danger is that the real problems presented by wife battering will be ignored because of the simplistic appeal of this solution. Misleading presentation of BWS may also inspire public resentment for the "special treatment" received by such accused women.

Second, the American case law has illustrated that BWS evidence can be interpreted so rigidly by the courts that any woman who does not conform strictly to the "victim" stereotype may be undermined in her effort to use BWS evidence to prove self-defence.[11] One author has also speculated that courts will construe BWS evidence as creating an exclusive category for female accuseds: judges might therefore be unwilling to consider any other factors that ought to mitigate the aggressive conduct of a woman — for instance, a woman who kills a rapist some time after the attack.[12] Third, the very concept of BWS as a syndrome means that women's responses to domestic violence risk being trivialized or controlled by the medical characterization of the causes and "symptoms" of BWS. It will therefore be important to cultivate feminist research regarding BWS and to identify it as constructed primarily by social and economic dependency rather than physical or mental illness.

The dangers associated with BWS evidence may warrant using an identical treatment strategy for its implementation. It may be possible to frame this syndrome as one that is experienced by anyone who is subjected to physical abuse within the context of a spousal, parent-child, or other type of relationship involving social and economic dependence.[13] Assuming that BWS can be conceptualized as a gender-neutral phenomenon, it might be possible to amend the *Canada Evidence Act* so as to ensure that judges permit such expert testimony to be put before the jury.[14] This gender-neutral approach may, however, mask the real circumstances of many women's lives.

If a gender-neutral version of BWS evidence were to be admitted into evidence, the evidence could be used to support an accused's claim that she did not have the requisite mental state (i.e., intention to kill) for criminal responsibility. If the accused wishes instead to use a statutory defence such as self-defence, defence of others or provocation, BWS evidence

may not get her much further if these defences are interpreted from a perspective that is not sensitive to the accused's subjective experience. The *Criminal Code* requires that an accused who wishes to rely on the defence of provocation must show that the provoking act or insult would have deprived the ordinary person of self-control.[15] Defence of self or others requires some showing of reasonableness either in the degree of force used by the accused or in her assessment of the imminence and degree of the danger.[16] Thus, the perceptions and conduct of the accused must at some level appear objectively "reasonable" to the trier of fact. Even if the judge or jury has the benefit of BWS evidence to assist in evaluating the accused's defence, the objective rider in these defences may preclude acquittal on the grounds that a "reasonable man", or even a "reasonable battered woman", would not have judged violence to be imminent.[17]

One solution to this problem would be to amend these defences so that they are assessed on a purely subjective basis. This solution might be of limited utility, in part because battered women may still, in fact, be judged on an objective standard if jurors cannot identify with them.[18] A preferable alternative would be to amend these statutory defences so that the trier of fact is directed specifically to consider:

- any past relationship involving physical or prolonged emotional abuse that affected the accused's perception of imminent and serious violence and the accused's ability to escape the violence;
- all the circumstances bearing on the accused's action, including his or her relative size and strength, socialization, and other economic or social resources.

Even this above solution has serious drawbacks because it accepts the key features of the current defence of self-defence, which was not fashioned with women in mind as accused persons. Rather, it was designed to deal with sudden confrontations between two strangers of relatively equal stature.[19] Thus even with a subjective and sensitive test, the battered woman can be acquitted only if she perceived that serious violence to her was imminent. Such a perception will undoubtedly be difficult to demonstrate when

the woman has acted when her partner was asleep or otherwise incapacitated — a not uncommon pattern. The defence of provocation had similar origins, and it too is not designed to allow for cumulative indignities or accused women who strike back not in the heat of passion, but rather when the victim is drunk or asleep, which is often the only time she can strike back.[20]

It is therefore suggested that an entirely new, gender-neutral defence of "self-preservation"[21] ought to be considered as a possible legislative amendment to the *Criminal Code*. This defence could require the accused to have acted out of utter desperation — that she subjectively, and perhaps even reasonably, believed that committing the offence was her only option. In assessing the charge, the trier of fact would be directed to consider questions such as whether the accused attempted to get protection or assistance from the state, whether she was afraid of retaliation, etc.[22] Conceivably this defence could be sufficiently broad to cover situations traditionally excluded by the defence of necessity, such as parents who steal to feed their children. It could be framed so as to provide for outright acquittal or conviction for a lesser offence.

■ Premenstrual Syndrome

Evidence that an accused woman suffers from premenstrual syndrome (PMS),[23] like evidence of battered woman syndrome, does not yet constitute a legally recognized defence standing on its own. Instead, PMS evidence is introduced to show that the woman was incapable of forming the mental state necessary for proof of the crime, that she was acting involuntarily or that, if convicted, her sentence should be mitigated. PMS evidence could possibly be used to support an insanity defence, but this route would be extremely disadvantageous to the woman because she would risk indefinite detainment in a mental institution.

PMS has been described by a segment of the medical community as an identifiable set of physical and psychological symptoms that severely affects about one of every ten menstruating women.[24] While these statistics

might sound alarming, it is clear that only a very small proportion of severely afflicted women engage in criminal activity.[25] The segment of the medical profession that supports recognition of PMS as a medical condition attributes the cause to a hormonal deficiency, which can be alleviated by progesterone therapy.[26] This medical theory is translated into the legal context as an explanation for some women's aggressive and criminal conduct and for their inability to control their own anti-social behaviour. It is argued that such women should not bear full criminal responsibility for acts they could not control, but should instead be required to undergo medical treatment to ensure future protection against loss of control.

Women have had some success in using PMS evidence to defend themselves against criminal charges in the United Kingdom. One accused argued that she did not possess the intention necessary for the offence of murder and was therefore convicted of the lesser offence of manslaughter.[27] Another woman has twice received an extremely generous sentence for serious offences against the person — probation with mandatory hormonal therapy — on the basis that she was unable to control her conduct because of PMS.[28]

Although the appellate courts in the United States have not yet addressed the issue of PMS evidence directly, it has been admitted in evidence at trial level in several cases.[29] In Canada, one court has rejected PMS as a defence, but acquitted the accused nonetheless on the basis that she did not form the specific intent to steal.[30] More recently, another Canadian judge relied upon PMS evidence at the sentencing stage for a woman convicted of an assault with a weapon upon her husband. This accused received a three-year suspended sentence and was placed on probation with the condition that she receive medical treatment as directed by her probation officer.[31]

Feminist commentators have been extremely sceptical about the ultimate benefits of supporting the notion of PMS as a factor excusing criminal conduct.[32] First, it is questioned whether PMS exists at all as an objective, biological fact. The research of Dr. Katharina Dalton, the main proponent behind both the hormonal deficiency theory and its corresponding

treatment plan, has been criticized thoroughly by other researchers for poor research design and unfounded conclusions.[33] Dalton has been unable to produce data to demonstrate low hormonal levels in women who claim to suffer from PMS, and she has not yet published data illustrating the effectiveness of progesterone therapy.[34] Therefore, PMS cannot be identified objectively in a given woman, and its diagnosis depends almost entirely on women's own reports of their symptoms. Further, other studies have indicated that women's *performance* levels for assorted tasks remain unaffected by the menstrual cycle.[35] This information is arguably more telling about biological realities than are mood studies.

Second, some feminist social psychologists argue that researchers have not paid sufficient attention to the cultural, social, and political influences upon women's experience of PMS. One author uses cross-cultural studies of women's perception of PMS to argue against biological explanations in favour of a social expectations theory.[36] This same author also notes that men and women describe PMS in the same terms, indicating a rare gender consensus regarding female experience.[37] It is therefore argued that women identify and explain their emotional lives in terms of PMS in part because it is culturally expected.

Other authors argue that the PMS label supports the cultural belief that womanhood is fundamentally inconsistent with aggressive and anti-social behaviour. It thus creates less dissonance for women and men to explain women's negative emotions and anti-social conduct by ascribing them to a biological condition that is beyond the woman's control, but still not a daily feature of her life, and that severely impairs her ability to function.[38] In this regard it is interesting to note one author's observation that PMS is usually used in the legal context to defend against charges involving criminal conduct that is perceived to be most inconsistent with femaleness. It has not, for instance, been used to defend women charged with prostitution.[39]

Third, concerns have been raised about whose interests are served by the medical and legal recognition of PMS. One author argues that medicalization of this experience permits doctors to define and legitimate only

certain aspects of the menstrual cycle. Women thus lose the power to notice and describe perceptions that do not fit this neat, but incomplete explanation.[40] More and more women are seeking medical treatment for PMS voluntarily and some, through the criminal law process, have been required to undergo sometimes lengthy assessment[41] and to submit to the hormonal therapy. It has therefore been argued that because the medicalization of female deviance has resulted historically in the control and abuse of women in the name of psychiatric treatment, great caution is warranted.

Another author argues that the interests of the state are served by the use of PMS as a biological explanation for female criminal conduct because it diverts attention from the other economic and social causes of crime.[42] Finally, one author has postulated that the interests of a patriarchal social and legal order are served by the use of the PMS label because it divides and controls women by isolating some women as destined by biology and in need of special allowances. More important, PMS serves the function of invalidating women's real and legitimate feelings of anger and frustration with their lives by pointing to biology as the cause and drugs as the cure.[43]

Fourth, some feminists object to the use of PMS evidence in criminal cases on the basis that even if the reality of PMS is to be acknowledged and its meaning for women explored, the legal system should not be permitted to use the concept: it will inevitably oversimplify, misapprehend, and distort PMS in order to fit it into existing legal categories.[44] Further, the stereotypes and "truths" that the legal system will thereby affirm will and already have had negative implications for women in other spheres of law. For example, it seems unquestionable that PMS will be used, perhaps successfully, to discredit women as mothers in custody battles.[45]

However, it may seem hasty to flatly reject use of PMS evidence by individual criminal defendants on the basis of erosion of the status of women as a class. Given that the criminal justice system can operate in a harsh fashion, it may be important to mitigate its effects even with this ambiguous lifeline for individual women accused of crime.[46] If we were to

accept that there is at least a social reality behind PMS rendering some women unable to control their own actions, then a primary precondition for criminal liability — the ability to choose — is absent, and a criminal sanction ought not to be imposed. While these women may be required to undergo hormonal therapy, many such women may have voluntarily sought treatment anyway.[47] Myths and stereotypes regarding women's biology are already pervasive, and one strategy might be to deal with those issues separately rather than rejecting PMS because it might generate further oppression of women.

It is suggested that support for reliance on PMS evidence in criminal trials should be considered cautiously. Further information is needed before a firm recommendation can be made. For instance, a consciousness-raising methodology should be used by women to develop an understanding of PMS that is not dominated by the medical model or culturally enforced gender roles. Research must be also undertaken by women in medicine, social psychology, and law to determine the implications of legal recognition of PMS. In particular, it must be asked whether a woman-defined model of PMS can be understood by, and used successfully within, our current legal system.

If reliance on PMS evidence were to be supported, the evidence would have to meet the admissibility requirements of expert evidence, which might be a problem given the disagreement among the experts.[48] Even if such evidence were admissible in criminal trials, women would not necessarily secure many acquittals or reduced charges. This is because PMS does not fit into any of the existing legal categories. It is unlikely to be classified as a "disease of the mind" so as to bring it within the insanity defence; in any event, this would not be a satisfactory result.[49]

A PMS sufferer would probably not be able to use an automatism defence, even though in one sense she might have acted involuntarily within the meaning of this defence. First, this defence usually requires a medical showing of disassociation or impaired consciousness — a state that is experienced only rarely as part of PMS.[50] Second, to the extent that PMS is a recurrent condition that can be medically controlled, women who are aware

of their condition will be precluded from reliance on automatism because their condition is "self-induced".[51] Third, resort to automatism puts the woman at risk that a court will conclude that PMS is due to "inherent causes" such as mental disorder, thus relegating her defence to insane automatism or, more bluntly, insanity.[52] Fourth, a successful defence of automatism results in an absolute acquittal, and courts may be unwilling to apply this defence so as to exonerate such women completely, particularly because no drug treatment orders can be made in the absence of a conviction.

A third possible defence, "no *mens rea*", offers more promise for women. This defence can be used when the accused is charged with an offence that requires proof of a specific state of mind and she can raise a doubt as to whether she in fact possessed this state of mind at the time of committing the offence. The accused could be convicted of any included offence that does not require proof of such a state of mind, or she may be entitled to an outright acquittal if there is no underlying offence. It will be recalled that this form of defence was used successfully in one United Kingdom case (murder reduced to manslaughter on the basis of legislated defence of diminished responsibility) and in one Canadian case (acquittal for theft). The problem with this defence is that Canadian courts have said that an accused who does not wish to use the insanity defence cannot allege that she lacked the capacity to form the intention to commit a crime.[53] Because an accused is therefore unable to argue that she was *incapable* of forming the intention to commit the crime, she must be careful to argue that she did not, *in fact*, intend to do so as a result of the influence of PMS.

It might therefore be advisable to recommend statutory enactment of a "diminished capacity" defence similar to the legislation now in force in the United Kingdom.[54] While the U.K. defence applies only to reduce murder to manslaughter, a Canadian equivalent could apply to all or selected offences. This generalized defence would be preferred because it will be the rare PMS sufferer who commits homicide; many more such women will be involved in petty offences such as theft. A diminished capacity defence would allow an accused to allege that her capacity to appreciate the consequences of her acts or to control her conduct was impaired at the time of the offence and that

this fact should reduce her accountability for the crime.[55] The accused would either be convicted of some lesser offence, or, if none exists, she would be acquitted.

Finally, there is nothing to prevent a convicted offender from introducing evidence at the sentencing stage to the effect that she suffered from PMS at the time of the offence. Such a person may thereby avoid incarceration, although she may be required to undergo hormonal therapy. One important advantage of using PMS evidence at this stage is that it permits generous, individualized decisions that have no strictly precedential value for other women.[56] However, even this use of PMS evidence is subject to the other dangers outlined earlier. It is therefore concluded that further study ought to precede unequivocal support for use of the PMS model in the criminal law.

■ Post-partum Depression

In Canada, a modified defence of post-partum depression is recognized implicitly by the *Criminal Code*. When a woman is charged with the homicide of an infant under one year of age, she may be convicted of the included offence of infanticide instead of murder or manslaughter.[57] This reduced offence carries a significantly lower penalty. Instead of a mandatory life sentence or a discretionary sentence of up to life imprisonment, the woman is liable for a maximum sentence of up to five years in prison.[58] If the Crown attorney chooses to lay the charge as infanticide rather than murder, the accused is, in practice, relieved of the burden of showing that her mental capacity was affected by childbirth.[59] A conviction for infanticide may also carry less moral stigma than a murder or manslaughter conviction.

A woman can be convicted of the lesser offence of infanticide where she was "not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind was then disturbed."[60] Although several different forms of post-partum depression are recognized by the medical profession,[61]

this condition is recognized legally in the infanticide offence only if it involves severe psychological disturbance that is connected to the physical aspects of birth and lactation. Furthermore, this condition constitutes a partial excuse mitigating the maximum available penalty only if the woman kills her infant, not if she commits any other offence. Outside of this statutory provision, a woman can try to use evidence that she suffered from post-partum depression to substantiate an insanity, automatism, or "no specific intention" defence. However, all these defences have the same limitations as those discussed with respect to PMS.

The mitigated offence of infanticide was apparently added to the criminal laws of England and Canada not as a measure of mercy, but rather to facilitate convictions for women who killed their newborns.[62] There had been a long history of sympathetic judges and juries who refused to return guilty verdicts for women — often unmarried and desperate — who were charged with such murders.[63] This offence therefore represented a law enforcement compromise enacted at a time when infanticide was a sufficiently common occurrence to justify criminal law intervention. It was also one component of the legislative web that purported to control all aspects of female sexuality and reproduction.[64] Thus the historical backdrop to this special offence might make one wary of a special defence of post-partum depression: it may well be that women fare better before juries when their actions are judged solely in the context of their actual experience and not on the basis of a partial legal defence.

A related concern is that the legal understanding of post-partum depression as articulated in the infanticide offence is clearly a medical model linking the depression to the physiological consequences of birth and lactation. The medicalization of this crime has served to perpetuate detrimental stereotypes about women's biology and psychology.[65] Research indicates that infanticide is related more closely to the economic and social conditions under which women live, including the social stigma attached to birth out of wedlock, among other things.[66] Like PMS, tolerance by the state for a medically based explanation for infanticide serves to deflect attention away from other significant influences on this crime, such as poverty.[67] It

has also been suggested that post-partum depression is related to the difficult adjustment women must make to the role of motherhood, which may carry many stressful expectations and changes such as the loss of employment outside the home.[68]

These concerns about the origins and construction of the mitigated offence of infanticide militate in favour of reform. The Law Reform Commission has, in fact, suggested that the offence should be repealed because infanticide today is too rare an occurrence to warrant a special offence.[69] It has instead proposed a statutory defence of diminished capacity to murder, which would result in manslaughter convictions for these women.[70] Removal of the special protection offered by this section should not be supported for two reasons. First, while it is true that infanticides are now extremely infrequent,[71] some of the conditions that produce this crime, e.g., poverty, have not been eliminated by any means, and thus the incidence of infanticide is subject to change. Furthermore, since this offence operates in practice as a "defence", the fact that infanticide is extremely uncommon should not be used to justify denial of a defence to those few women against whom charges are processed. Second, convicting a woman of manslaughter instead of infanticide means that the woman will not receive the benefit of a lower sentence ceiling and a less serious criminal record.

One alternative to repeal would be to retain a revised, non-medically based offence of infanticide, which would only be applicable to female accuseds. The offence could remain gender-specific because even though post-partum depression is not caused solely by the hormonal changes resulting from childbirth, there is some evidence that biological sources may have some role in producing this condition.[72] Furthermore, the social and economic forces acting upon these women are generally gender-specific: women continue to bear the brunt of social disapproval for birth out of wedlock; they are expected to assume the primary responsibility for parenting, even within marriage; they are more likely to be deserted and left with the child than to desert; and they continue to suffer disastrous economic consequences as a result of childbirth.[73] Given the uncertain role of hormonal influences and the fact that men do not generally experience comparable

pressures, it is arguably inappropriate to extend the same benefit to this group.

The revised offence would not use the purely biological model, but would require proof of mental disturbance arising from either the physiological consequences or other environmental stresses consequent upon birth.[74] This reform could have the advantages of eliminating the "mad mother" image and of recognizing women's social and economic realities. In order to mitigate the effects of post-partum depression in the context of criminal conduct other than infanticide, a statutory diminished capacity defence applying to offences beyond murder could also conceivably be used, either to acquit such women or to convict them of lesser offences.[75]

A preferable alternative might be to enact a general defence of "post-partum depression" that could be drafted in gender-neutral terms and that would apply to all criminal offences. The advantages of a gender-neutral approach would be that it would avoid Charter challenges and would eliminate some of the stereotyping associated with the current sex-specific offence. This extension of compassion may also be important given that some men, particularly those who have the sole charge of an infant, experience comparable levels of depression.[76] It is therefore recommended that a gender-neutral defence be considered, but its availability should be conditional upon a showing of post-partum depression linked to a major or solitary child-care role, extreme economic deprivation, and/or social disapprobation directed at the accused as parent.

CONCLUSION

This paper has explored four new criminal law issues of interest to women and has made some preliminary proposals regarding legislative solutions. It must be emphasized that these recommendations are tentative: each issue deserves extensive research and consultation in its own right. For instance, the proposal regarding mandatory arrest legislation for wife assault

might be retracted if studies were to demonstrate that the guidelines issued by provincial attorneys general were working well. The proposed use of rape trauma syndrome evidence might be altered if a clearer picture emerged of the overall effect on conviction rates and rape victims' trial experiences.

It must also be reiterated that all these proposals will be tempered by the Council's policies as to the appropriate equality model to be pursued and its mandate to seek either immediate or long-term legislative reform of the *Criminal Code*. It is hoped that this paper has provided the background information and issue definition necessary to facilitate future development of legislative policies on these important issues of personal autonomy for women in Canada.

NOTES

Equality Theories

1. Wendy W. Williams, "The Equality Crisis: Some Reflections on Culture, Courts and Feminism", *Women's Rights Law Reporter*, vol. 7, no. 3 (spring 1982), p. 200.

2. But see Williams, *ibid.*, pp. 185-188, for a discussion of an unsuccessful constitutional challenge to a gender-specific statutory rape law in the United States in the case of *Michael M. v. Superior Court of Sonoma County (Cal.)*, 450 U.S. 464 (1981), SCUS.

3. For a discussion of the theme of woman as "Other" in law, see generally, Mary Jane Mossman, " 'Otherness' and the Law School: A Comment on Teaching Gender Equality", *Canadian Journal of Women and the Law/Revue juridique "la femme et le droit"*, vol. 1, no. 1 (1985), pp. 213-218.

4. Compare, for example, the cases of *Dothard v. Rawlinson*, 433 U.S. 321 (1977), SCUS (exclusion of women from high-risk prison guard posts, is not sex-discriminatory because women are more vulnerable to rape) and *Rostker v. Goldberg*, 453 U.S. 57 (1981), SCUS (exclusion of women from the military draft is not sex-discriminatory because women are not similarly situated with respect to ability to assume combat role) with *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (exclusion of men from university for women amounts to a violation of the equal protection clause) and *Re Phillips and Lynch et al.; A.G. of Nova Scotia*, (1986) 27 D.L.R. (4th) 156 (N.S.S.Ct.) (family benefits legislation requiring that single fathers be disabled before being entitled to benefits is invalid).

5. Linda J. Krieger and Patricia N. Cooney, "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality", *Golden Gate University Law Review*, vol. 13 (1983), pp. 539-547.

6. Katherine De Jong, "On Equality and Language", *Canadian Journal of Women and the Law/Revue juridique "la femme et le droit"*, vol. 1, no. 1 (1985), pp. 119-130.

7. Ann C. Scales, "Towards a Feminist Jurisprudence", *Indiana Law Journal*, vol. 56, no. 3 (1980-81), pp. 436-437; Sylvia Law, "Rethinking Sex and the Constitution", *University of Pennsylvania Law Review*, vol. 132, no. 5 (June 1984), pp. 955-1040. Scales has since changed her position on this issue; see note 10.

8. Williams, "The Equality Crisis", pp. 196-197.

9. Kathleen A. Lahey, "Implications of Feminist Theory for the Direction of Reform of the Criminal Code", paper prepared for the Law Reform Commission of Canada, Ottawa, 1984, pp. 18, 31.

10. Scales has since moved beyond her own earlier theoretical contribution, *supra*, note 7. She states, "I then believed that *only* pregnancy and breastfeeding could be taken into account, because those were the only two "objectively" determinable differences between the sexes. . . . I now see that limitation as unnecessarily reticent and guaranteed to achieve nothing, as many such liberal assumptions are." Ann C. Scales, "The Emergence of Feminist Jurisprudence: An Essay", *Yale Law Journal*, vol. 95, no. 7 (June 1986), p. 1381, footnote 46.

11. The main proponent of this theory is perhaps Elizabeth Wolgast, *Equality and the Rights of Women* (Ithaca: Cornell University Press, 1980), pp. 30-34.

12. Christine L.M. Boyle et al., *A Feminist Review of Criminal Law* (Ottawa: Status of Women Canada, 1985), p. 17.

13. Ellen C. Dubois et al., "Feminist Discourse, Moral Values, and the Law: A Conversation", *Buffalo Law Review*, vol. 34, no. 1 (winter 1985), pp. 11, 27-28.

14. See: *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

15. Scales, "The Emergence of Feminist Jurisprudence: An Essay", p. 1382.

16. See generally, Catharine A. MacKinnon, "Making Sex Equality Real" in *Righting the Balance: Canada's New Equality Rights*, ed. Lynn Smith (Saskatoon: Canadian Human Rights Reporter Inc., 1986), pp. 37-43.

17. Boyle et al., *A Feminist Review of Criminal Law*, p. 15.

18. Scales, "The Emergence of Feminist Jurisprudence: An Essay", p. 1396.

19. *Ibid.*

20. The author is indebted to Professor Sheila McIntyre, Queen's University Faculty of Law, for this observation.

21. Statement by MacKinnon, in Dubois et al., "Feminist Discourse, Moral Values, and the Law: A Conversation", pp. 27-28.

22. Boyle et al., *A Feminist Review of Criminal Law*, pp. 14-15.

23. National Association of Women and the Law, *The Canadian Charter of Rights and Freedoms: Not Just Words on Paper*, brief submitted to the Parliamentary Sub-Committee on Equality Rights (Ottawa: 1985), pp. 5-10.

24. *Ibid.*

25. Boyle et al., *A Feminist Review of Criminal Law*, p. 15.

26. For development of the thesis that women pursue both autonomy and "connectedness" needs, see: Carol Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1982).

New Criminal Law Issues For Women

■ **Wife Battering**

1. Caroline J. Coates, "The Need for an Informed Response to Domestic Violence Cases", *Canadian Community Law Journal/Revue canadienne de droit communautaire*, vol. 8 (1985), p. 53. Coates notes that the provinces of British Columbia, Manitoba, Ontario, as well as the Yukon and the Northwest Territories have issued guidelines regarding the processing of domestic violence cases. *Ibid.*, p. 55.

2. A short-term study of the police response to such guidelines in an experimental project in 1981 in London, Ontario, declared them to be successful in prompting appropriate police response. Carole Anne Burris and Peter Jaffe, "Wife Abuse as a Crime: The Impact of Police Laying Charges", *Canadian Journal of Criminology/Revue canadienne de criminologie*, vol. 25, no. 3 (July 1983), pp. 309, 316.

   A more recent study regarding similar guidelines in Manitoba does not assess whether the directives to the police have resulted in specific changes in the police department's response to wife assault because separate statistics on domestic violence were not maintained by the police prior to 1983. However, based on a comparison of all assault charges before and after the 1983 directives, the authors conclude that more domestic violence cases are being brought into the system. Jane E. Ursel and Dawn Farough, "The Legal and Public Response to the New Wife Abuse Directive in Manitoba", *Canadian Journal of Criminology/Revue canadienne de criminologie*, vol. 28, no. 2 (April 1986), pp. 171, 172. On the other hand, the authors found the arrest rate for domestic violence calls to be approximately 9% in 1983, a rate that would not seem to represent an enormous improvement in police response. *Ibid.*, p. 175.

   American studies of the police response to legislative mandate have also reached somewhat negative conclusions. See, for instance, Maria K. Pastoor, "Police Training and the Effectiveness of Minnesota 'Domestic Abuse' Laws", *Law and Inequality: A Journal of Theory and Practice*, vol. 2, no. 2 (August 1984), p. 557, where she describes persistent police refusal to enforce the law in the absence of clear policy directives from police chiefs. *Ibid.*, pp. 562-563.

3. See, for example: Barbara K. Finesmith, "Police Response to Battered Women: A Critique and Proposals for Reform", *Seton Hall Law Review*, vol. 14, no. 1 (1983), pp. 74-109. From her survey results she concludes that "[i]n municipalities where there are written guidelines regarding domestic violence but statutory treatment of the problem is weak or non-existent, the resulting police behaviour is expected to be mediational in character at best." *Ibid.*, pp. 94-95. For critiques of the mediational response to domestic violence, see: Lisa G. Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women", *Harvard Women's Law Journal*, vol. 7, no. 1 (spring 1984), p. 57 and Dianna R. Stallone, "Decriminalization of Violence in the Home: Mediation in Wife Battering Cases", *Law and Inequality: A Journal of Theory and Practice*, vol. 2, no. 2 (August 1984), pp. 493-519.

4. The study of the effectiveness of the Manitoba directives found that they did have a public education effect, but it is unclear from the study whether attitudes before and after the directives were compared and whether a publicity campaign accompanied the directives. See: Ursel and Farough, "The Legal and Public Response to the New Wife Abuse Directive in Manitoba", pp. 180-181.

5. Several authors note that wife-assault cases processed through Family Court have a lower conviction rate: Burris and Jaffe, "Wife Abuse as a Crime: The Impact of Police Laying Charges", p. 317. See: also Gwen Fraser, "Taking Spousal Assault Seriously: A Philosophical View of Legal Contradiction", *Windsor Yearbook of Access to Justice*, vol. 5 (1985), pp. 369, 372.

6. For a summary of American reforms, see: Lisa G. Lerman and Sharon Goldzweig, "Protection of Battered Women: A Survey of State Legislation", *Women's Rights Law Reporter*, vol. 6, no. 4 (1980), p. 271. A description of the Australian reforms can be found in Robyn Lansdowne, "Domestic Violence Legislation in New South Wales", *University of New South Wales Law Journal*, vol. 8, no. 1 (1985), pp. 80-105.

7. For a more thorough discussion of the reasons underlying police non-enforcement of assault laws against battering husbands, see: Amy Eppler, "Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?", *Yale Law Journal*, vol. 95, no. 4 (March 1986), pp. 789-802.

8. Law Reform Commission of Canada, *Recodifying Criminal Law, volume 1* (Ottawa: 1986), "Report 30". The report fails to define "spouse", but it is clearly a gender-neutral term intended to extend beyond married partners to those who live together in common-law relationships.

9. The offence of assault by touching is the equivalent of the current offence of common or simple assault, and assault by harming would be roughly the equivalent of assault causing bodily harm or maiming. *Ibid.*, ss. 7(1), 7(2), p. 58.

10. *Ibid.*, s.10(10), p. 67.

11. *Ibid.*, p. 68.

12. *Ibid.*

13. Law Reform Commission of Canada, *Assault* (Ottawa: 1984), "Working Paper 38".

14. *Ibid.*, p. 37.

15. *Ibid.*, p. 38.

16. *Ibid.*, p. 52.

17. Several authors make the point that framing the offence as a crime "against the family" means that the law enforcers' view of what action will preserve the "family" or the "relationship" will predominate over the individual woman's personal safety. Emphasis on the value of the family at all costs also fails to recognize that relationships characterized by violence cannot and perhaps should not be preserved. See, for example: Pastoor, "Police Training and the Effectiveness of Minnesota 'Domestic Abuse' Laws", pp. 580-581.

18. Eleven states have enacted such offences. For example, under the Ohio law, "a first offense under the spouse assault law is a first-degree misdemeanor, punishable by a six-month jail sentence or a $1,000 fine, or both. A subsequent offense is a fourth-degree felony, punishable by five years in jail or a $2,500 fine, or both." Ohio Rev. Code Ann. 2919.25, 2919.26, 2933.16 (Pages 1982) as described in Lisa G. Lerman and Franci Livingston, "State Legislation on Domestic Violence", *Response to Violence in the Family and Sexual Assault*, vol. 6, no. 5 (September-October 1983), p. 17.

19. New South Wales has legislated an offence of domestic violence defined to include any offence of violence from common assault to murder committed upon currently or formerly married and cohabiting partners. This recent amendment to the *Crimes Act 1900* (N.S.W.) was passed in 1982 and incorporated into s.4 of the Act. See: Lansdowne, "Domestic Violence Legislation in New South Wales", p. 81.

20. Lerman and Goldzweig, "Protection of Battered Women", p. 274.

21. *Ibid.*

22. The states are Delaware, Maine, Minnesota, North Carolina, Oregon, and Utah. See: Lerman and Livingston, "State Legislation on Domestic Violence", pp. 10-11.

23. A recent study completed in Milwaukee found that although 82% of 146 assaulted women asked the police to arrest the batterer, only 14% were in fact arrested. See: Lee H. Bowker, "Police Services to Battered Women — Bad or Not So Bad?", *Criminal Justice and Behaviour*, no. 9 (1982), pp. 476, 485-86 discussed in Eppler, "Battered Women and the Equal Protection Clause", pp. 788-789, footnote 3. See also: Ursel and Farough, "The Legal and Public Response to the New Wife Abuse Directive in Manitoba", p. 175, who found that arrests were being effected in an average of only 9% of domestic violence calls in Winnipeg, Manitoba, in six months of 1983. For discussions of lawsuits pursued in the United States with an aim of forcing police to protect battered women by responding to domestic violence calls and making arrests, see: Pauline W. Gee, "Ensuring Police Protection for Battered Women: The *Scott v. Hart* Suit", *Signs: Journal of Women in Culture and Society*, vol. 8, no. 3 (spring 1983), p. 554, and Jeffrey A. Shapiro, "The Inadequate Police Protection of Battered Wives: Can a City and its Police be Held Liable Under the Equal Protection Clause?", *Fordham Urban Law Journal*, vol. 14 (1986), p. 417.

24. One study found that "victims of domestic assault are about twice as likely to be assaulted again if police do not arrest the attackers." U.S. Department of Justice, National Institute of Justice, *Minnesota Domestic Violence Experiment* (Washington, D.C.: 1983) as discussed in Eppler, "Battered Women and the Equal Protection Clause", p. 791, footnote 16. For another study that reached a similar conclusion, see: Lawrence W. Sherman and Richard A. Berk, "The Specific Deterrent Effects of Arrest for Domestic Assault", *American Sociological Review*, vol. 49 (April 1984), p. 270.

25. Pastoor states that "[s]ome officers report that arresting immediately after establishing probable cause, rather than waiting to arrest, reduces the danger to officers." Pastoor, "Police Training and the Effectiveness of Minnesota 'Domestic Abuse' Laws", p. 593, footnote 177 citing written testimony of Ellen Pence before the Minnesota Senate Judiciary Committee for *Hearings on S.F. 240*, 73rd Sess. (1983). Similar findings have been reported by a study conducted within the police force in Duluth, Minnesota. Kathleen Quinn, "Mandatory Arrest and No-Drop Policies: Are They a Good Idea?", information brief prepared for the Illinois Coalition Against Domestic Violence (spring 1984), p. 2.

26. Quinn, "Mandatory Arrest and No-Drop Policies", p. 1.

27. Catherine Elliott, Linda Giddings, and Avreayl Jacobson, "Against No-Drop Policies", *National Coalition Against Domestic Violence Voice* (summer 1985), p. 3.

28. *Ibid.*

29. Quinn, "Mandatory Arrest and No-Drop Policies", p. 3.

30. One author argues, for instance, that "[m]any persons in the anti-battering movement, like those in the anti-rape and the anti-pornography movements, urge that the legal and criminal justice systems be . . . used as a weapon to destroy sexism. This assumes that the state is a neutral force which can be exploited and which has no class character of its own. . . . [u]nqualified support of the state leads to reform which reinforces rather than erodes oppression." Dorie Klein, "Can This Marriage Be Saved? Battering and Sheltering", *Crime and Social Justice*, vol. 12 (winter 1979), p. 28.

31. The thesis that non-intervention by the state in the realm of "the private" has effectively licensed men to physically dominate women has been expressed by Nadine Taub and Elizabeth M. Schneider, "Perspectives on Women's Subordination and the Role of Law" in *The Politics of Law*, ed. David Kairys (New York: Pantheon Books, 1982), pp. 117-139.

32. North Carolina law requires arrest when the officer has probable cause to believe that the partner is violating an eviction order, and both Utah and Maine require arrest where the officer has probable cause to believe that a protection order is being violated. See: Lerman and Goldzweig, "Protection of Battered Women", p. 284 and Lerman and Livingston, "State Legislation on Domestic Violence", p. 18.

33. The state of Maine has required that police arrest in such situations. Lerman and Livingston, "State Legislation on Domestic Violence", p. 18.

34. *Criminal Code*, s.450(2).

35. The officer can issue an appearance notice to the accused (*Criminal Code*, s.451); the officer can also request that a justice issue a summons to the accused (s.455.3(4)) or a warrant for the arrest of the accused (s.455.3(4)).

36. Coates, "The Need for an Informed Response to Domestic Violence Cases", pp. 64-65.

37. Seventeen states in the United States have expanded police immunity from lawsuits for wrongful arrests made in good faith. Lerman and Livingston, "State Legislation on Domestic Violence", pp. 10-11. Canada's *Criminal Code* does provide some protection for officers in s.450(3), but this may not be viewed as sufficient by the police constituency.

38. In Mississippi, for instance, "[e]very law enforcement official who receives a report of domestic violence must immediately file charges against the abuser on behalf of the victim if the facts submitted to him or her are sufficient." Lerman and Livingston, "State Legislation on Domestic Violence", p. 17.

39. See: Jane W. Ellis, "Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue", *Journal of Criminal Law and Criminology*, vol. 75, no. 1 (1984), pp. 56-102. Ellis cites statistics to the effect that 92% of battered woman cases are not prosecuted. *Ibid.*, p. 58, footnote 7.

40. See generally: Maureen McLeod, "Victim Noncooperation in the Prosecution of Domestic Assault", *Criminology*, vol. 21, no. 3 (August 1983), p. 395.

41. See generally: Ellis, "Prosecutorial Discretion to Charges in Cases of Spousal Assault".

42. One such program has been initiated in Seattle, Washington. It requires arrest and the laying of charges, and it makes some provision for the assault victim in terms of services and input to the sentence recommendation. This program has apparently been quite successful: the number of wife-assault prosecutions has doubled and the conviction rate for such cases now stands at 83%. Finesmith, "Police Response to Battered Women", p. 100.

43. For instance, one prosecutor in Santa Barbara reports that the attrition rate for spouse-abuse cases is the same as for other offences and that the cooperation rate of such witnesses is 92%. She attributes these favourable rates to a firm message that the offence is deserving of state intervention and the provision of informational services for victims. Interview with Sally Buckley, Seattle District Attorney's Office discussed by Ellis, "Prosecutorial Discretion to Charges in Cases of Spousal Assault", p. 94, footnotes 124-126. See also: Gerry J. Léger, *Criminal Charges as a Means of Assisting Victims of Wife Assault* (Ottawa: Solicitor General Canada, 1984), p. 10, "Programs Branch User Report no. 1984-85", who recommends laying charges in conjunction with providing resources for the victim.

44. Elliott, Giddings, and Jacobson, "Against No-Drop Policies", p. 3.

45. *Ibid.*

46. *Criminal Code*, s.455.

47. For a general discussion of the nature of prosecutorial discretion and possible Charter of Rights remedies, see: Donna C. Morgan, "Controlling Prosecutorial Powers — Judicial Review, Abuse of Process, and Section 7 of the Charter", *Criminal Law Quarterly*, vol. 29, no. 1 (December 1986), pp. 15, 17-23.

48. See, for instance: R. Roy McMurtry, "Memorandum to all Crown Attorneys Re: Domestic Violence and Child Abuse", Ministry of the Attorney General for Ontario, August 20, 1982, p. 2.

49. See discussion, note 2.

50. For examples of such cases in the United States and Canada, see: Center for Women Policy Studies, " 'No-Drop' Prosecution Policies Sometimes Backfire Against Victims", *Response to the Victimization of Women and Children*, vol. 7, no. 3 (1984), p. 5; Ellen Adelberg, "When the Victim Goes to Jail: The Law on Contempt of Court", *Status of*

Women News/La revue statut de la femme, vol. 9, no. 3 (August 1984), p. 8.

51. Amendment to the *Crimes Act 1900* (N.S.W.) in s.407AA (1982) discussed in Lansdowne, "Domestic Violence Legislation in New South Wales", pp. 81-82.

52. *Ibid.*, p. 82.

53. In fact, Lansdowne has found that of the 35 cases decided in 1984 excusing spouses from testifying, 56.7% were excused on the basis of "reconciliation" of the parties — a reason that is not set forth as permissible in the legislation. Lansdowne, *ibid.*, p. 84, citing *Report of the New South Wales Domestic Violence Committee* (September 1985), p. 31. This is important information that can be obtained only through such a public check on the system and that is significant for future policy making.

■ **Sexual Assault**

1. Susan Heald, "Social Change and Legal Ideology: A Critique of the New Sexual Assault Legislation", *Canadian Criminology Forum/Forum canadien de criminologie*, vol. 7, no. 2 (spring 1985), p. 117.

2. See generally: Lorenne M.G. Clark and Debra J. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977); Dianne Kinnon, *Report on Sexual Assault in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981).

3. See, for example: Susan Caringella-MacDonald, "Sexual Assault Prosecution: An Examination of Model Rape Legislation in Michigan", *Women and Politics*, vol. 4, no. 3 (fall 1984), p. 65; K. Edward Renner and Suresh Sahjpaul, "The New Sexual Assault Law: What Has Been Its Effect?", *Canadian Journal of Criminology/Revue canadienne de criminologie*, vol. 28, no. 4 (October 1986), p. 407.

4. Assault is defined as the threatened or actual application of force to another without that person's consent. *Criminal Code*, s.244(1).

5. See, for example, testimony given by Ms. Tamra Thomson on behalf of the National Association of Women and the Law before the Standing Committee on Justice and Legal Affairs regarding the proposed offence of sexual assault in Bill C-53: "The courts already know what assault is; it is a concept that they are familiar with dealing with. As I said before, I do not think they will have a problem in coming up with their own wonderful definition of 'sexual' ". Canada, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 1st Session, 32nd Parliament, 1980-83, vol. 78, p. 29.

6. *R. v. Chase* (1984), 40 C.R. (3d) 282 (N.B.C.A.).

7. *R. v. Ramos* (1984), 42 C.R. (2d) 370 (N.W.T. Terr. Ct.).

8. *R. v. Alderton* (1985), 49 O.R. (2d) 257 (Ont. C.A.).

9. *R. v. Taylor* (1985), 59 A.R. 179 (Alta. C.A.).

10. Christine Boyle, "Sexual Assault and the Feminist Judge", *Canadian Journal of Women and the Law/Revue juridique "la femme et le droit"*, vol. 1, no. 1 (1985), p. 99.

11. T. Bretell Dawson, "Legal Structures: A Feminist Critique of Sexual Assault Reform", *Resources for Feminist Research/Documentation sur la recherche féministe*, vol. 14, no. 3 (November 1985), p. 42.

12. Leave to appeal to the Supreme Court of Canada has been granted for the *R. v. Chase* decision: 57 N.R. 61 (S.C.C. 1984). Arguments heard spring 1986. As of April 21, 1987 S.C.C. decision still reserved.

13. One author has observed: "If the new definition of sexual assault . . . is accompanied by shorter penalties, and if there are ambiguities in the statute, the only result may be shorter bargained sentences until one side decides to test the new statute at trial." Leigh Bienen, "Rape III — National Developments in Rape Reform Legislation", *Women's Rights Law Reporter*, vol. 6, no. 3 (1980), p. 211.

14. *R. v. Piercey* (1986), 59 Nfld. & P.E.I.R. (Nfld. Dist. Ct.), reversed on appeal: (1986), 60 Nfld. & P.E.I.R. 76 (Nfld. C.A.).

15. One author has used statistical information regarding post-law reform sexual assault prosecutions in the United States. Loh has concluded that the legislation has *not* resulted in a larger pool of convicted offenders, but has instead promoted more accurate labelling of offence convictions because of the new categories of offences. See: Wallace D. Loh, "The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study", *Washington Law Review*, vol. 55 (1980), p. 593; see also: Charles Paul Schuerman, "Forcible Rape in Washington — Criminal and Civil Sanctions", *Gonzaga Law Review*, vol. 19, no. 2 (1983-84), pp. 370-374. A recent Canadian study regarding prosecutions after the 1983 *Criminal Code* amendments has determined that there has not yet been an increase in the rate at which police categorize sexual assault complaints as "founded", although there has been a slight increase in the clearance rate for such offences. See: Renner and Sahjpaul, "The New Sexual Assault Law", p. 409. Caringella-MacDonald, "Sexual Assault Prosecution", p. 79, has studied conviction patterns in Michigan, and has concluded that the new rape reform laws have somewhat reduced the attrition rate for sexual assault cases.

16. Loh also highlights the fact that while the new laws have resulted in a decrease in deferred or suspended sentences, there has been a corresponding decrease in the incarceration rates for offenders as rehabilitation and out-patient treatment come to be emphasized by sentencing judges. See: Loh, "The Impact of Common Law and Reform

Rape Statutes on Prosecution", p. 599. Loh does not indicate whether these changes can be explained by overall changes in sentencing patterns for all offences.

17. See generally: Gillean Chase, "An Analysis of the New Sexual Assault Laws", *Canadian Woman Studies/Les cahiers de la femme*, vol. 4, no. 4 (summer 1983), p. 53; Leah Cohen and Constance B. Backhouse, "Desexualizing Rape: Dissenting View on the Proposed Rape Amendments", *Canadian Woman Studies/Les cahiers de la femme*, vol. 2, no. 4 (1980), p. 99; Kathleen A. Lahey, "Implications of Feminist Theory for the Direction of Reform of the Criminal Code", paper prepared for the Law Reform Commission of Canada, Ottawa, 1984, pp. 34-39.

18. Gary D. Lafree, Barbara F. Reskin, and Christy A. Visher, "Jurors' Responses to Victims' Behaviour and Legal Issues in Sexual Assault Trials", *Social Problems*, vol. 32, no. 4 (April 1985), pp. 400-402.

19. This pattern was predicted in Christine L.M. Boyle, *Sexual Assault* (Toronto: Carswell, 1984), pp. 179-180. The author's own Canadian research (Elizabeth A. Sheehy, "Sentencing Under the New Sexual Assault Laws", University of Ottawa Faculty of Law), work in progress, and one American study document the values represented by recent sexual assault sentencing cases: Linda L. Bradmiller and William S. Walters, "Seriousness of Sexual Assault Charges: Influencing Factors", *Criminal Justice and Behaviour*, vol. 12, no. 4 (December 1985), p. 481 (familial relationship between offender and victim dramatically related to more lenient sentences).

20. Similarly, one legal historian has argued that past legislative efforts to extend the protection of rape laws to a wider group of female victims has met with resistance from a judiciary that continues to impose the "woman as sexual property" theme on rape prosecutions. See generally: Constance B. Backhouse, "Nineteenth Century Canadian Rape Law 1800-1892", in *Essays in the History of Canadian Law, Vol. II*, ed. David H. Flaherty (Toronto: Osgoode Society, 1983), pp. 200-247.

21. The Justice Monitoring Program, Department of Justice, Ottawa, will report on the operation of the new sexual assault laws in 1987, and the Solicitor General for Canada has also commissioned a study on the effects of the law.

22. See, for example: Heald, "Social Change and Legal Ideology", pp. 122-123. In addition, the Metro Action Committee on Public Violence Against Women and Children has prepared a report on sentencing practices that is not yet in final form. For information, contact Pat Marshall, Executive Director, Toronto office.

23. Boyle, "Sexual Assault and the Feminist Judge", pp. 99-100.

24. This example closely follows the rape reform laws of Illinois. See: James P. Carey, "The New Illinois Criminal Sexual Assault Statute", *Loyola University of Chicago Law Journal*, vol. 16, no. 4 (summer 1985), pp. 761-763. Michigan laws structure the offence similarly, but define sexual contact as the intentional touching of intimate parts of the body if such touching can be reasonably construed as being for the purpose of sexual gratification. Susan Estrich, "Rape", *Yale Law Journal*, vol. 95, no. 6 (May 1986), pp. 1151-1153. The state of Washington, on the other hand, uses three levels for sexual penetration (forcible compulsion under aggravated circumstances, forcible compulsion, and without consent or with threats of substantial harm to property rights) and a separate offence of "indecent liberties" for sexual contact. See: Loh, "The Impact of Common Law", pp. 543-553. For a general review of American rape law reforms, see: Bienen, "Rape III — National Developments in Rape Reform Legislation".

25. Boyle, "Sexual Assault and the Feminist Judge", p. 104.

26. *Ibid.*, p. 103.

27. *Ibid.*, p. 105. In this regard it should be noted that there is some public support for the idea of criminalizing sexual harassment defined as "offensive behaviours applied to gain sexual access and behaviours with sexual overtones that are applied to gain competitive control or dominance." See: Robert T. Sigler and Ida M. Johnson, "Public Perceptions of the Need for Criminalization of Sexual Harassment", *Journal of Criminal Justice*, vol. 14, no. 3 (1986), pp. 230, 233, 237.

28. Rape trauma syndrome can be described as follows: "The acute stage occurs immediately following the assault and is characterized by fear, anxiety, somatic symptoms such as nausea and vomiting, inability to concentrate, and an emotional confusion which can impair the victim's general level of functioning. The second stage, a period of pseudoadjustment, is characterized by denial: the victim's attempt to avoid thinking about the rape and assume a business-as-usual attitude. The final stage of integration and resolution includes feelings of depression, guilt, rage, excessive fear and anxiety, sleeping disturbance, and ruminations about the rape which signal a struggle to incorporate the rape into the victim's identity." Bonnie J. Buchele and James P. Buchele, "Legal and Psychological Issues in the Use of Expert Testimony on Rape Trauma Syndrome", *Washburn Law Journal*, vol. 25 (1985), p. 28.

29. Bernard A. Raum, "Rape Trauma Syndrome As Circumstantial Evidence of Rape", *Journal of Psychiatry and Law*, vol. 11, no. 2 (summer 1983), p. 209.

30. Buchele and Buchele, "Legal and Psychological Issues", p. 31.

31. Evidence of RTS can be used to explain seemingly inexplicable behaviour by women who have been assaulted (e.g., failure to escape at first opportunity after assault, destruction of evidence, failure to report incident immediately). Judith Rowland, *The Ultimate Violation* (Garden City: Doubleday, 1985), p. 157; Amy DePaul, "The Rape Trauma Syndrome: New Weapon for Prosecutors", *National Law Journal* (October 28, 1985), p. 20. The woman's own feelings of guilt or confusion regarding such actions might be alleviated by the explicatory function of RTS evidence.

32. Buchele and Buchele, "Legal and Psychological Issues", p. 27.

33. Toni M. Massaro, "Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony", *Minnesota Law Review*, vol. 69 (1985), p. 398. It should also be noted that "Post Traumatic Stress Disorder" (PTSD) has been recognized by the A.P.A. in its Diagnostic and Statistical Manual III (1980) and that rape is listed as one of the triggering events for PTSD. RTS is generally recognized as a *form* of PTSD, and certain of its symptoms (e.g., sexual dysfunction, etc.) set it apart from the trauma resulting from events other than rape. See: David McCord, "The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions", *Boston College Law Review*, vol. 26, no. 5 (September 1985), pp. 1151-1153.

34. This is the conclusion reached by several authors: McCord, "The Admissibility of Expert Testimony", pp. 210-211; Buchele and Buchele, "Legal and Psychological Issues", p. 41; Massaro, "Experts, Psychology, Credibility and Rape", p. 457.

35. See: *State v. Marks*, 647 p. 2d 1292 (Kan. S. Ct. 1982); *State v. McQuillen*, 689 p. 2d 822 (Kan S. Ct. 1984); *State v. Liddell*, 685 p. 2d 918 (Mont. S. Ct. 1984); *State v. Ogle*, 668 S.W. 2d 138 (Mo. C.A. 1984); *State v. Radjenovich*, 674 p. 2d 333 (Ariz. C.A. 1983); *State v. Reid*, 475 N.Y.S. 2d 741 (N.Y.S. Ct. 1984); *State v. Whitman*, 475 N.E. 2d 486 (Ohio S. Ct. 1984).

36. See: *People v. Bledsoe*, 681 p. 2d 291 (Cal. S. Ct. 1984); *State v. Saldana*, 324 N.W. 2d 227 (Minn. S. Ct. 1982); *State v. McGee*, 324 N.W. 2d 232 (Minn. S. Ct. 1982); *Allewalt v. State*, 487 A. 2d 664 (Md. C.A. 1985).

37. See: *Q. et al. v. Minto Management Ltd. et al.*, (1985) 49 O.R. (2d) 531 (Ont. H. Ct.).

38. The same approach taken by the American courts is used by the Canadian courts. Compare *Frye v. United States*, 293 F.1013 (D.C.Cir. 1923) with *R. v. Fisher* (1961), 34 C.R. 420 (Ont. C.A.).

39. This proposition is supported by American case law on this precise issue (e.g., *State v. McQuillan*, 689 p. 2d at 829) and Canadian cases regarding the general principle (e.g., *R. v. Phillion* (1974), 53 D.L.R. (3d) 319 (Ont. C.A.).

40. For an important discussion of the use of psychiatry to discredit rape complainants, see generally: Roberta J. O'Neale, "Court Ordered Psychiatric Examinations of a Rape Victim in a Criminal Rape Prosecution — or How Many Times Must a Woman Be Raped?", *Santa Clara Law Review*, vol. 18 (1978), pp. 119-153. Another author has expressed the fear that judicial acceptance of RTS evidence will result in a new "myth" that "all rape victims suffer long-term psychological effects". See: Suzanne D. Baldwin, "The Use of Rape Trauma Syndrome Evidence in a Rape Trial: Valid or Invalid?", *Wake Forest Law Review*, vol. 21, no. 1 (spring 1985), p. 113.

41. Although one U.S. court has refused to make such an order (*State v. Liddell*, 685 p. 2d at 924), another court has indicated that an accused would have such a right (*State v. McQuillan*, 689 p. 2d at 827).

42. See: O'Neale, "Court Ordered Psychiatric Examinations of a Rape Victim", p. 147.

43. This approach is recommended by several American authors as the one most likely to avoid the many admissibility arguments (e.g., prejudice to the accused, etc.) that will be raised. See, for example: Buchele and Buchele, "Legal and Psychological Issues", pp. 40-41.

44. See: O'Neale, "Court Ordered Psychiatric Examinations of a Rape Victim", p. 150.

45. Rowland, *The Ultimate Violation*, pp. 115-116.

46. "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations", *Harvard Law Review*, vol. 98, no. 4 (February 1985), pp. 806-807.

47. See, for example: the Texas legislation: Tex. Crim. Proc. Code Ann. Art. 38.071 2.4 (Vernon Supp. 1986) discussed in C. Michael Clark, "Televised Testimony vs. the Confrontation Clause . . . The Use of Videotapes in the Prosecution of Child Sexual Abuse", *Houston Law Review*, vol. 23, no. 5 (October 1986), pp. 1215-1219.

48. For an excellent discussion of the different criteria used in the various state statutes (e.g., different age requirements for the child to be eligible for this special substituted procedure, etc.), see: Deborah Clark-Weintraub, "The Use of Videotaped Testimony of Victims in Cases Involving Child Sexual Abuse: A Constitutional Dilemma", *Hofstra Law Review*, vol. 14 (fall 1985), pp. 265-268.

49. Ross Eatman, "Videotaping Interviews with Child Sex Offense Victims", *Children's Legal Rights Journal*, vol. 7, no. 1 (winter 1986), p. 13. But see: Gary B. Melton, "Sexually Abused Children and the Legal System: Some Policy Recommendations", *American Journal of Family Therapy*, vol. 13, no. 1 (1985), pp. 64-65, where the author argues that there is no convincing evidence that children suffer severe trauma from the judicial process and courtroom procedures.

50. Jacqueline Y. Parker, "The Rights of the Child Witness: Is the Court a Protector or Perpetrator?", *New England Law Review*, vol. 17, no. 3 (1982), p. 653.

51. Joyce Miller, "The Victim Witness and Video Technology", *Canadian Community Law Journal/Revue canadienne de droit communautaire*, vol. 8 (1985), p. 47.

52. *Bill C-15, An Act to Amend the Criminal Code and the Canada Evidence Act*, House of Commons of Canada, first reading, October 29, 1986, s.15.

53. *Ibid.*, s.13(1).

54. *Ibid.*

55. This safeguard appears to be constitutionally required in the United States in order to ensure that the accused is not lightly denied the right to be publicly confronted with the witnesses who testify against him or her. See: "The Testimony of Child Victims in Sex Abuse Prosecution", pp. 809-818. As the law now stands in Canada, evidence that is analogous to videotaped testimony (transcripts from preliminary inquiries) can be read in at trial in place of live evidence only if the witness is dead, insane, too ill to travel or testify, or is absent from Canada: *Criminal Code*, s.643. While one court has used an expansive interpretation of "ill" to include a victim who is suffering psychologically as a result of an aggravated sexual assault (*R. v. Novalinga* (1985), 19 C.C.C. (3d) 190 (Ont. H. Ct.)), this interpretation ought to be included explicitly in this legislative proposal, which would amend s.643 of the *Criminal Code*.

56. These safeguards are the minimal requirements of reliability upon which the accused is constitutionally entitled to insist in the United States when taped testimony is offered in lieu of a live witness. See the cases discussed in Clark, "Televised Testimony vs. The Confrontation Clause", pp. 1232-1233. The proposed legislation incorporates these safeguards to ensure that the section would survive a Canadian constitutional challenge on the basis of the rights in s.7 (right not to be deprived of liberty except in accordance with principles of fundamental justice) and s.11(d) (right to a fair and public hearing) of the *Canadian Charter of Rights and Freedoms*.

57. This concern is noted by Clark-Weintraub, "The Use of Videotaped Testimony of Victims in Cases Involving Child Sexual Abuse", p. 295.

58. This requirement is necessary to permit the accused to expose weaknesses in the videotaped testimony.

59. Thus, even if a Canadian court decided that the legislative proposal offended an accused's Charter rights as described in note 55, the legislative infringement would likely be "saved" under s.1 of the Charter. The measure is "demonstrably justified in a free and democratic society" because it is designed to meet a legitimate government objective and is

tailored so as to provide maximum protection for the interests of the accused.

■ **Feticide**

1. *Criminal Code*, s.251(1).

2. *Ibid.*, s.251(2).

3. *Ibid.*, s.251(1).

4. See, for example: the laws of Iowa (Iowa Code Ann. 707.7 (West 1979)) and Illinois (Ill. Ann. Stat. Ch. 38, 9-1.1 (Smith-Hurd. Supp. 1984)), discussed in Jeffrey A. Parness, "Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life", *Harvard Journal on Legislation*, vol. 22 (1985), pp. 133, 148.

5. Telephone conversation with Joe Gilhooley, member, Fetal Status Working Group, Protection of Life Project, Law Reform Commission of Canada, Ottawa, November 1986.

6. These are the standards for criminalization articulated in Law Reform Commission of Canada, *Recodifying Criminal Law*, vol. 1 (Ottawa: 1986), p. 8, "Report 30".

7. Parness, "Crimes Against the Unborn", p. 149.

8. *Ibid.*

9. *Roe v. Wade*, 410 U.S. 113 (1973).

10. See the Iowa statute, for example Iowa Code Ann. 707.7 (West 1979).

11. See, for example: Utah Code Ann. 76-5-201(2) (Interim Supp. 1983) discussed in Mary E. Barrazotto, "Judicial Recognition of Feticide: Usurping the Power of the Legislature?", *Journal of Family Law*, vol. 24, no. 1 (1985-86), p. 51.

12. See: Cal. Penal Code 270 (West Supp. 1982) discussed in Parness, "Crimes Against the Unborn", p. 140.

13. *Criminal Code*, s.251(2).

14. Dawn E. Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection", *Yale Law Journal*, vol. 95, no. 3 (January 1986), p. 612.

15. *Ibid.*

16. W.W. Watters et al., "Response to Edward Keyserlingk's Article: The Unborn Child's Right to Prenatal Care", *Health Law in Canada*, vol. 4, no. 2 (1983), pp. 32-34.

17. See, for example, the civil cases discussed in: Susan R. Weinberg, "A Maternal Duty to Protect Fetal Health?", *Indiana Law Journal*, vol. 58, no. 3 (1983), pp. 534-535.

18. Parness, "Crimes Against the Unborn", p. 139.

19. Michigan, for example, permits recovery under such a tort theory: *Grodin v. Grodin*, 301 N.W. 2d 869 (1981).

20. For a discussion of the causation problems in tort lawsuits for injuries caused during birth, see: Bartha Knoppers, "Childbirth, Injury and Proof of Causation", *Resources for Feminist Research/Documentation sur la recherche féministe*, vol. 15, no. 3 (November 1986), p. 36.

21. *Criminal Code*, s.197.

22. Parness, "Crimes Against the Unborn", pp. 139-140.

23. For a summary of the Canadian law on this issue, see generally: Sanda Rodgers, "Fetal Rights and Maternal Rights: Is There A Conflict?", *Canadian Journal of Women and the Law/Revue juridique "la femme et le droit"*, vol. 1, no. 1 (1985), p. 456.

24. *Ibid.*, pp. 466-469.

25. See: John E.B. Myers, "Abuse and Neglect of the Unborn: Can the State Intervene?", *Duquesne Law Review*, vol. 23, no. 1 (fall 1984), pp. 70-71.

26. W.W. Watters et al., "Response to Edward Keyserlingk's Article", pp. 32-33.

27. Rodgers, "Fetal Rights and Maternal Rights", p. 456.

28. See: Utah Code cited in Barrazotto, "Judicial Recognition of Feticide".

29. See: Illinois and Iowa legislation cited in Parness, "Crimes Against the Unborn".

30. Iowa Code Ann., cited in Parness, *ibid.*

31. Johnsen, "The Creation of Fetal Rights", p. 613. However, it should be noted that the way the Illinois legislation frames the offence does confer recognition of the harm to the woman because it requires that the accused either intended to kill or do great bodily harm to the mother, was reckless as to this result, or was attempting to commit a forcible felony against the mother. Ill. Rev. Sta., ch. 38 9-1.1 (Supp. 1984).

32. N.M. Stat. Ann. 30-3-7 (Supp. 1985).

33. Johnsen, "The Creation of Fetal Rights", p. 611.

■ Special Defenses for Women

1. "Battered women typically live in a constant state of fear, and have a very diminished sense of self-worth. Frequent and recurrent beatings create a state of 'learned helplessness' characterized by extreme passivity and submissiveness. . . . a feeling of isolation develops, which further reinforces the sense of helplessness. Eventually, frustration and lack of recourse may leave the battered woman with only two alternatives — to submit to further beating and pain with the possibility of resultant death, or to strike back and thus risk criminal liability themselves." Joann D'Emilio, "Battered Woman's Syndrome and Premenstrual Syndrome: A Comparison of Their Possible Use as Defences to Criminal Liability", *St. John's Law Review*, vol. 59, no. 3 (spring 1985), pp. 564-565.

2. For self-defence cases, see: *State v. Wanrow*, 559 p. 2d 548 (Wash. 1977); *State v. Allery*, 682 p. 2d 312 (Wash. 1984); *People v. Minnis*, 455 N.E. 2d 217 (Ill. 1983). For an example of use of a provocation defence, see: the unreported case of Celia Ripley, reported in *The Guardian*, November 1, 1983, discussed by Susan Edwards, "Gender 'Justice'? Defending Defendants and Mitigating Sentence" in *Gender, Sex and the Law*, ed. Susan Edwards (Beckhenham, Kent: Croom Helm Ltd., 1985), p. 141.

3. See the newspaper accounts of the trial and sentence for Mae Favell: Bruce Owen, "No Jail for Abused Wife", *The Winnipeg Sun*, September 24, 1986, discussed in Marnie McCall, "Acceptance of Defence of 'Battered Woman Syndrome' in Canada", memorandum for the Canadian Advisory Council on the Status of Women, December 9, 1986, p. 1.

4. Phyllis L. Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defence", *Harvard Women's Law Journal*, vol. 8 (spring 1985), pp. 127-128.

5. See text, p. 25.

6. For a discussion of a recent case using BWS evidence, *State v. Kelly*, 478 A. 2d 364 (N.J. 1984), see: Julie A. Lipsman, "Criminal Law: Domestic Violence", *Annual Survey of American Law* [1985], pp. 848-850.

7. *R. v. Whynot (Stafford)* (1983), 9 C.C.C. (3d) 449 (N.S.C.A.).

8. Victoria Savoyard was acquitted of manslaughter and Marion Tom was convicted of manslaughter instead of murder. Both cases are discussed in McCall, "Acceptance of Defence of 'Battered Women Syndrome' in Canada", p. 1.

9. Mae Favell and Marion Tom both received suspended sentences for their manslaughter convictions, *ibid.*

10. One reporter has stated: "An Ontario Supreme Court jury has acquitted a woman of manslaughter in the death of the man she lived with for 10 years, accepting the defence she was a battered wife." "Battered-wife defence accepted in Minaki case", *Winnipeg Free Press*, May 2, 1986, cited by McCall, *ibid.*

11. See the critique advanced by Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defence", pp. 144-150. One case noted by Crocker "upheld the exclusion of battered woman syndrome testimony where the evidence clearly demonstrated the defendant's ability to fight back", *ibid.*, p. 146.

12. *Ibid.*, p. 151.

13. This is usually described as part of BWS: "Generally, the battered woman is reluctant to report the battering, because she and her children are economically dependant upon her abusive husband . . ." D'Emilio, "Battered Woman's Syndrome and Premenstrual Syndrome", p. 564.

14. See the amendments suggested earlier regarding the admissibility of rape trauma syndrome evidence in the text, p. 26.

15. *Criminal Code*, s.215(2). It should be noted that this objective test can incorporate some of the accused's subjective features such as her age and sex (*R. v. Hill*, (1986) 51 C.R. (3d) 97 (S.C.C.)) and perhaps the past relationship itself (*R. v. Daniels*, (1983) 7 C.C.C. (3d) 542 (N.W.T.C.A.)).

16. *Criminal Code*, ss.34, 37.

17. Christine L.M. Boyle et al., *A Feminist Review of Criminal Law* (Ottawa: Status of Women Canada, 1985), p. 40.

18. *Ibid.*, p. 47.

19. Edwards, "Gender Justice?", p. 142.

20. *Ibid.*, pp. 140-141.

21. *Ibid.*, p. 142: "Concluding that the criminal law does not allow for a construction within its legal categorisation of self-preservation. . ." .

22. These questions were devised by Boyle et al., *A Feminist Review of Criminal Law*, p. 41, as part of their recommended revision of ss.34 and 37 of the *Criminal Code*.

23. "PMS refers to a myriad of symptoms such as headache, anxiety, depression, and memory loss which recur with regularity in the premenstruum and which are absent in the post-menstruum. . . . the patients seen in a premenstrual clinic usually are women who experience

symptoms that significantly interfere with their daily lives." Thomas L. Riley, "Premenstrual Syndrome as a Legal Defence", *Hamline Law Review*, vol. 9, no. 1 (February 1986), pp. 195-196.

24. Katharina Dalton, "Premenstrual Syndrome", *Hamline Law Review*, vol. 9, no. 1 (February 1986), p. 145.

25. *Ibid.*

26. *Ibid.*, p. 151.

27. *Regina v. English*, Norwich Crown Court, November 10, 1981, discussed in Candy Pahl-Smith, "Premenstrual Syndrome as a Criminal Defence: The Need for a Medico-Legal Understanding", *North Carolina Central Law Journal*, vol. 15, no 2 (1985), pp. 246, 256.

28. See: *Regina v. Craddock*, (1981) 1 C.L. 49 and *Regina v. Smith*, (1982) Crim. L.R. 531 (C.A.), discussed in Pahl-Smith, *ibid.*, pp. 255-256.

29. Richard T. Oakes, "PMS: A Plea Bargain in Brooklyn Does Not A Rule of Law Make", *Hamline Law Review*, vol. 9, no. 1 (February 1986), p. 204.

30. T. Fennell, "Premenstrual Shoplifting: two PMS illness pleas bring justice with mercy", *Alberta Reporter* May 1984, p. 30, discussed in Eugene Meehan and Katherine MacRae, "Legal Implications of Premenstrual Syndrome: A Canadian Perspective", *Canadian Medical Association Journal*, vol. 135 (September 15, 1986), pp. 605-606.

31. David Helwig, "Treatment for PMS ordered as stabber put on probation", *Globe and Mail*, February 10, 1987.

32. See: Sophie Laws, "The Sexual Politics of Pre-Menstrual Tension", *Women's Studies International Forum*, vol. 6, no. 1 (1983), p. 20.

33. Mary Brown Parlee, "The Premenstrual Syndrome", *Psychological Bulletin*, vol. 80, no. 6 (1973), pp. 454-465; Carolyn Wood Sherif, "A Social Psychological Perspective on the Menstrual Cycle", in *The Psychobiology of Sex Differences and Sex Roles*, ed. Jacquelynne E. Parsons (Washington: Hemisphere Publishing Corporation, 1980), pp. 245, 259-261.

34. See, for example: Kay A. Heggestad, "The Devil Made Me Do It: The Case Against Using Premenstrual Syndrome as a Defence in a Court of Law", *Hamline Law Review*, vol. 9, no. 1 (February 1986), pp. 157-158.

35. Sherif, "A Social Psychological Perspective on the Menstrual Cycle", pp. 250-252.

36. Mary Brown Parlee, "Social and Emotional Aspects of Menstruation, Birth, and Menopause", in *Psychosomatic Obstetrics and Gynecology*, ed. David D. Youngs and Anke A. Ehrhardt (New York: Appleton-Century-Crofts, 1980), pp. 67, 70-71.

37. *Ibid.*, p. 71.

38. Laws, "The Sexual Politics of Pre-Menstrual Tension", p. 21.

39. Susan S. M. Edwards, *Women On Trial* (Manchester, Manchester: University Press, 1984), pp. 79-97.

40. Laws, "The Sexual Politics of Pre-Menstrual Tension", pp. 20-21.

41. In *Women On Trial*, pp. 88-89, Edwards describes one case where the woman was remanded for 13 weeks for PMS assessment in a charge involving possession of an offensive weapon.

42. *Ibid.*, pp. 98-99.

43. Laws, "The Sexual Politics of Pre-Menstrual Tension", pp. 20, 22.

44. Edwards, *Women On Trial*, pp. 88, 98.

45. D'Emilio, "Battered Woman's Syndrome and Premenstrual Syndrome", p. 586, footnote 165, reports that PMS has already been used to justify a custody order to the benefit of a father in a U.K. case.

46. Laws, "The Sexual Politics of Pre-Menstrual Tension", p. 21: "This may be necessary or even useful in dealing with an unjust legal system, but the consequences for women struggling toward a positive view of themselves are worrying." See also: Linda Luckhaus, "A Plea for PMT in the Criminal Law" in *Gender, Sex and the Law*, pp. 176-178.

47. Luckhaus, *ibid.*, p. 175.

48. Laws, "The Sexual Politics of Pre-Menstrual Tension", p. 30.

49. This is because the woman would end up detained indefinitely in a psychiatric facility on a Lieutenant Governor's warrant: *Criminal Code*, s.545.

50. Nora Mulligan, "Premenstrual Syndrome", *Harvard Women's Law Journal*, vol. 6, no. 1 (spring 1983), pp. 224-225.

51. Oakes, "PMS: A Plea Bargain in Brooklyn", p. 212.

52. See, for example: *R. v. Revelle* (1979), 48 C.C.C. (2d) 267 (Ont. C.A.).

53. *R. v. Wright* (1979), 48 C.C.C. (2d) 334 (Alta. C.A.), leave to S.C.C. dismissed (1979), 29 N.R. 623 n.

54. *Homicide Act*, 1957, 5 and 6 Eliz. 2, c.11 (U.K.), s.2(1).

55. Lawrence Taylor and Katharina Dalton, "Premenstrual Syndrome: A New Criminal Defence?", *California Western Law Review*, vol. 19, no 2 (1983), pp. 281-283.

56. Mulligan, "Premenstrual Syndrome", p. 227.

57. *Criminal Code*, s.216.

58. *Ibid.*, s.220.

59. Edwards, *Women On Trial*, p. 95.

60. *Criminal Code*, s.216.

61. See: Parlee, "Social and Emotional Aspects", p. 74, for three different usages of the term "post-partum depression".

62. Katherine O'Donovan, "The Medicalisation of Infanticide", *Criminal Law Review* (May 1984), p. 261.

63. See generally: Constance B. Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada", *University of Toronto Law Journal*, vol. 34 (1984) pp. 447-478.

64. *Ibid.*, pp. 475-477.

65. O'Donovan, "The Medicalisation of Infanticide", p. 264.

66. Peter C. Hoffer and N.E.H. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (New York: New York University Press, 1981), pp. 147-151. For a more modern study, see: Tiffany Field et al., "Pregnancy Problems, Postpartum Depression, and Early Mother-Infant Interactions", *Developmental Psychology*, vol. 21, no. 6 (1985), p. 1155 (relating post-partum depression to marital difficulties and ambivalence about the child).

67. Edwards, *Women On Trial*, p. 99.

68. Parlee, "Social and Emotional Aspects", pp. 74-75.

69. Law Reform Commission of Canada, *Homicide* (Ottawa: 1984), p. 77.

70. *Ibid.*

71. It is estimated that there are approximately 100 infanticides per year in the United States. Nelson Lund, "Infanticide, Physicians and the Law: the "Baby Doe" Amendments to the Child Abuse Prevention and Treatment Act", *American Journal of Law and Medicine*, vol. 11, no. 1 (1985), p. 3.

72. See studies cited in Parlee, "Social and Emotional Aspects", pp. 73-74.

73. Elizabeth A. Sheehy, "Criminal Law: Homicide" (Book Review), *Canadian Bar Review/Revue du Barreau canadien*, vol. 63, no. 2 (September 1985), p. 442, footnote 16.

74. This recommendation was made in the U.K. by the Criminal Law Revision Committee in its *Fourteenth Report, Offences Against the Person*, Cmnd. 7844 (1980), para. 105, discussed by O'Donovan, "The Medicalisation of Infanticide", p. 263.

75. See: text, p. 45.

76. See: Edwards, *Women On Trial*, p. 96.

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